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LAW AND ORDER
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CANADA'S INDIGENOUS PEOPLE

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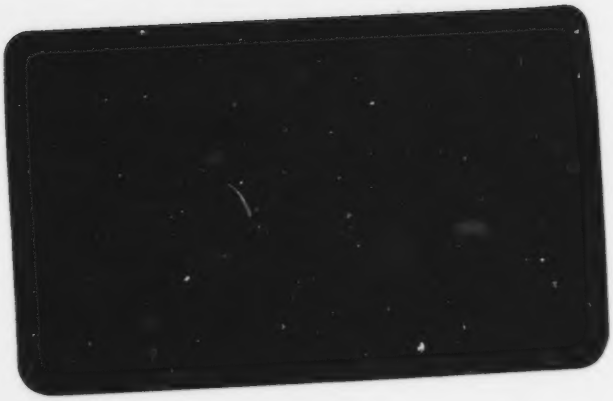

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LAW AND ORDER FOR CANADA'S INDIGENOUS PEOPLE

NO. 1984-7

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ABSTRACT

This report, prepared for the federal Ministry of the Solicitor General, provides a critical assessment of available Canadian research literature (generally 1972-1983) describing the impact of selected components of the criminal justice system upon Indigenous people in Canada. Explanations for the over-involvement of Indigenous people at key junctures in the criminal process and the proposed solutions to these problems are scrutinized.

Contrary to the assumptions explict in much of the literature, these reviewers assume that the over-representation of Indigenous peoples throughout the criminal justice system is the inevitable consequence of colonization and underdevelopment. Policy in Canada must, the reviewer argues, address itself to the macro-level of socio-economic planning rather than attempt to reduce over-involvement by adjustments simply at the micro-level of service delivery systems and programs.

From this perspective, the research on the dimensions of law enforcement and the problem of discriminatory policing are evaluated in terms of solutions commonly practiced in Canada: cross-cultural education of police, legal education of Indigenous peoples, and indigenization of rural policing. Research on the criminal court process is also examined to critique the array of actors which are offered to explain Indigenous over-involvement in this sphere: the inadequacy of legal representation, the mystification of court processes and language, and judicial discretion. Literature on legal services to Indigenous people, the indigenization of legal training and adjudication processes, and the development of tribal

courts and courtworker services are all examined. The review also looks at the research on over-representation in prison and explanations for this phenomenon, including the findings on judicial bias in sentencing, the importance of fine defaulting, and attempts to indigenize correctional programs. Finally, the report identifies gaps in existing research and consequent policy implications for discriminatory laws, for police discretion, for legal services, and for decision-makers who influence the nature of correctional dispositions for Indigenous offenders.

SUMMARY

(a) Objectives and Methodology

Our overall research objectives were to provide a critical assessment of the major research literature which has examined the impact of selected aspects of the criminal justice system on Canada's Indigenous people; to discuss possible solutions in terms of current and future policy and program implications for the Ministry; and to identify for the Ministry areas/directions for future research.

In consultations with Carol LaPrairie, Ministry of the Solicitor General, we agreed to organize the research objectives by addressing the following specific tasks:

> *1) Review all theoretical and empirical literature relating to Natives and justice. The criminal justice areas to be specifically examined include causes and prevention, law enforcement, prosecution and legal services, courts and sentencing, and community, institutional and post-institutional corrections. While the focus is to be on Canadian-based literature,....other material which has obvious implications for this issue as it relates to the Native condition in society is also to be reviewed....;*
>
> *2) Provide a comprehensive synthesis of the material reviewed, including an assessment of its completeness, quality and relevance, so as to present a full picture of the state of social science knowledge with regard to Natives and justice, within a broad, multi-disciplinary theoretical framework;*
>
> *3) Provide, as a separate section of the report, a discussion of the implications of existing research knowledge for current and future policies and programs relating to Natives and justice; and*
>
> *4) As a final section, identify further research directions which could be pursued to usefully complement existing knowledge.*

Given the above parameters, we have chosen in our review to attempt to look at Indigenous people's problems within the criminal justice system

and the possible solutions to these problems in the context of colonization and underdevelopment. This has meant isolating the causal explanations/themes/issues and solutions common to most of the literature, and recategorizing the way these have been dealt with in terms of a context of colonization.

(b) Principal Conclusions

Chapter one examines the status of Indigenous peoples in Canadian society, provides baseline data on the extent of their over-involvement in the courts and jails, and considers competing explanations in the literature for this excessive over-representation. It confirms the demographic dimensions of Indigenous peoples' colonization: an adversity characterized by welfare dependency, a marginal existence in urban areas, and economic vulnerability and vulnerability to arrest on reserves and in cities. This dependence is compounded and perpetuated by their encounters with the criminal justice system.

Inherent in much of the work reviewed is the order/assimilationist assumption which explains Indigenous peoples' dependency and powerlessness in terms of a "conflict of values" or a "culture of poverty," and which "blames the victim" by focusing on individual and/or group characteristics.

> *The order/assimilationist perspective minimizes the significance of power and coercion in everyday life between subordinate and superordinate groups, emphasising [instead] the social psychology of individual and group adaption to dominate group values and practices....While attention is given to problems of the few dominant group members who are prejudiced and discriminate,....specific attentions [is] given to the characteristics of natives, [and is] interpreted as evidence of their lack of adequate*

> *socialization and assimilation, anomie, etc....[A blaming the victim ideology means that] the stigma that marks the victim and accounts for his victimization [may be] an acquired stigma, a stigma of social, rather than genetic, origin[, b]ut the stigma, the defect, the fatal differences—though derived in the past from environmental forces—is still located within the victim....*[1]

The authors argue that the connections or links between the social and economic conditions data and the over-involvement data can be better understood by examining the contradictions that Indigenous people encounter as part of the process of underdevelopment; that is, by integrating the analytical framework of exploitation into a discussion of Indigenous peoples as an underclass in Canada.

Chapter two looks at the extent to which both substantive law and especially the law enforcement system discriminate against Indigenous people. From the viewpoint of Indigenous peoples, most laws in Canada are those of the colonizer although, as a result of struggle by the colonized, some legislative changes have been made, particularly in the areas of aboriginal and treaty rights. So far as law enforcement is concerned, the literature commonly conceptualizes Indigenous over-involvement as partly a result of discriminatory policing exercised in a manner which is negatively biased against Indigenous people. The solution, outlined in most of the literature, requires that law enforcement agencies exercise positive discretion. This has three basic thrusts: (1) cross-cultural education to promote an understanding between Indigenous and non-Indigenous peoples; (2) legal education for Indigenous peoples so they are less vulnerable to the abuse of their rights and so that they will know the law and obey it; and (3) the "indigenization" of policing through affirmative

hiring of Indigenous peoples to work as police in regular forces (either as regular members or as special constables), or through the transfer of law enforcement to Indian bands (autonomous tribal policing).

It is clear that the literature tends to support the view that law enforcement personnel hold negative attitudes towards Indigenous peoples and this is reflected in arrest and charge rates. But very little empirical research specifically examines the impact of police discrimination on Indigenous peoples and, instead, descriptions of the relationship between Indigenous peoples and the police center around "blaming the victim." The argument here is that Indigenous people draw police attention to themselves because of their conspicuous criminality. Indigenous peoples, rather than police actions, are the object of analysis and no efforts are made to link discrimination to policing practices.

Some of the works reviewed suggest that cross-cultural education for law enforcement personnel and Indigenous peoples, as well as public legal education for Indigenous peoples, will promote greater understanding between the parties, will result in less discrimination, and may reduce over-involvement with the criminal justice system. In fact, the rhetoric is a long way from the reality of Indigenous peoples' experience and from the policy of the Canadian state which has been designed to assimilate Indigenous people and not to encourage ethnic pluralism. Moreover, multicultural education (and affirmative action programs) at the police recruitment level can be undone in the field by a prevailing negative professional ethos.

Assumptions about the indigenization of policing take two forms. One consists of either the creation of special status police officers within existing police forces (Option 3(b)) or affirmative hiring practices to attract Indigenous people to regular policing; while the second consists of the devolution of law enforcement functions to agencies autonomously controlled and staffed by Indigenous peoples (Option 3(a)). Both forms of indigenization assume there will be less discriminatory policing through the more sensitive, culturally-conscious exercise of police discretion. Research has yet to reveal whether the indigenization of policing, and the informal justice measures it implies, improve the quality of life, are simply cheaper, or widen the net of the criminal justice system to the detriment of the original goal. It may be the case, as one author has concluded, that Indigenous peoples accept the need for policing and always have: *"The problem is therefore not a cross-cultural conceptual disagreement but rather one relating to police attitudes and methods."*[2] For example, there has been some criticism that the literature does not adequately address the question of how the fact that Native special constables generally come from the more affluent, better educated sector of band populations affects special constable policing. There have also been more substantial criticisms that the autonomous policing literature may reveal a disenchantment with option 3(b) which emerges when independent researchers allow Indigenous peoples to express their real concerns. Most studies done by or for Indigenous organizations approve of autonomous policing while those done by or for government agencies appear to prefer policing by special constables. Finally, there

is a lack of research which would examine both whether or not assumptions about policing in urban areas or in off-reserve rural areas are applicable to on-reserve policing, and what alternative methods of law enforcement are available for the significant number of Indigenous peoples who have migrated to urban areas.

In Chapter three the Canadian criminal court process and court-related services for Indigenous peoples (including legal aid services, prosecutorial agencies, and Native Courtworker Services) are reviewed and alternative court systems (the indigenization of courts and lawyers, and tribal courts) are examined. Emphasis is on the process of the court itself rather than the outcomes of court actions.

The literature chronicles the major concerns with the court process as being the qualitative and quantitative inadequacy of legal representation, the inability of Indigenous peoples to understand legal proceedings, and the issues of judicial bias and the wide discretion permitted judges—often leading to the choice of custodial rather than community-based sentencing options. An improvment in legal services for Indigenous people through increasing the number of Indigenous lawyers and providing Native Courtworkers and interpreters, public legal education programs to demystify legal processes, and the establishment of Indigenous adjudicatory institutions and Indigenous judges and justices of the peace are generally proposed as solutions to the problems identified above.

According to most of the literature surveyed, problems of inaccessibility, under-utilization, lack of outreach and preventive educational programs, lack of legal expertise, and language and cultural barriers

could be alleviated by adequately funded, autonomous Indigenous control of legal services. But it is evident from the programs reviewed that an appropriate plan to provide legal representation to Indigenous peoples has yet to be designed and successfully implemented. A more important point is that these programs may be overly optimistic about the impact that law can have on the lives of Indigenous peoples since changing or improving only legal services will have a limited effect if the economic and political relationships between the colonized and the colonizer remain basically unaltered.

The Native Courtworker is presented as a demystifier for the client and a cross-cultural educator for non-Indigenous personnel working in the criminal justice system. However, the problems associated with Native Courtworker services (e.g., political accountability) resemble those of Native special constables. As well, having Indigenous people work within already existing legal institutions does not mean that this will result in their ultimately having control over their own treatment within these institutions.

It is widely held that the over-involvement of Indigenous peoples with the criminal justice system and the quality of their experience within that system can be influenced by indigenizing the forum in which sentencing occurs. Tribal courts and the appointment of Indigenous judges and justices of the peace appear to hold considerable potential for giving Indigenous peoples some discretion in the ways they are handled in the criminal process. In Canada there are no tribal courts of the sort found in some American states, and there is little empirical literature which

specifically looks at Indigenous justices of the peace. Where Indigenous justices have been appointed, with few exceptions, they tend to be both disproportional in comparison to total appointments and gravely under-utilized. And in all the jurisdictions using Native Justice of the Peace Programs, the literature reveals major problems including a lack of training and limited authority and status. Somewhat similar weaknesses exist in the tribal courts in the United States because of their unnecessarily narrow jurisdiction which closely resembles the dominant court sytem where there is overall control of the courts by the Bureau of Indian Affairs, and where few traditional customs are codified in law.

Chapter four discusses explanations for the over-representation of Indigenous peoples in Canada's prisons including the contribution of the sentencing process. Possible implications for correctional and prison programs are explored, and some suggestions are made for making judicial dispositions and correctional programs more relevant to the situation of Indigenous people.

Correctional statistics show that a disproportionate number of Indigenous people (especially Indigenous women) have always been imprisoned. Explanations of this over-representation have ranged from those based upon the underlying socio-economic conditions of Indigenous peoples, to the phenomenon of urban migration, to changing demographic factors such as age, to the relationships between alcohol use and prison. Still other explanations in the literature have focused on the inappropriateness of sentences (e.g., imprisonment of fine defaulters), the possibility of racial discrimination in sentencing and, more frequently, the question of

differential sentencing (either in excessive leniency or excessive severity). Given the discretionary power of judges and the apparent judicial practice of individualizing sentences, differential sentencing outcomes would seem inevitable. But beyond the problems inherent in the practice of individualization, studies of admission data raise important questions about possible disparity of sentences; that is, inequality of penalties as applied to identifiable groups of people. However, the research literature does not reveal much about the exact nature of the influence of criminal justice decision-makers upon Indigenous peoples. In particular, very little is known about the rationales behind judicial discretionary decisions. This means that, as with findings in the other components of the criminal justice sytem, the solutions to these problems repeat the theme of cross-cultural education, particularly for judges and prison personnel; the indigenization of prison, probation, and parole staff; and the development of decision-making forums and services that are totally controlled by Indigenous people. Importantly, few of these solutions specifically address the problems of inadequate data on prison admissions and other dispositions, and the issue of the overall relationship of Indigenous women to the criminal justice system. The challenge to researchers is to establish whether any factors other than the nature and seriousness of the offence, and the number of past offences are creating bias in judicial decision-making in the case of Indigenous offenders.
In addition to research on the subjective nature of the sentencing process, particularly as it applies to judicial decision-making, a further area of study still not adequately explored in Canada is the differential north/

south, rural/urban justice for Indigenous offenders.

Despite the long-standing concern about the over-representation of Indigenous offenders in Canadian prisons, surprisingly little research is reported on programs designed for Indigenous prisoners (e.g., Native Brotherhoods and Sisterhoods) or on alternative community programs. Instead, the literature concentrates on a description of the problems as perceived by Indigenous organizations and writers and by non-Indigenous critics. When correctional alternatives have been studied and where they are demonstrably an option to prisons for predominantly Indigenous offender groups, they have also demonstrated the pressures to conform to the formal justice system. Without greater administrative and policy control at the local community level, it is argued, such projects will fail to respond to real community needs.

In addition to the problem of alternatives and the often recurring issue of the cultural relevance of existing prison programs for Indigenous offenders, the discretionary powers of correctional officials is another major issue. It is suggested that Indigenous offenders may not have equal access to some prison programs, to early release on parole and temporary absence, and to the standard option to prison, supervised probation.

Indeed, within specific corrections areas (probation, parole and alternative dispositions such as fine options) there is evidence of inappropriate assessment criteria for eligibility and evidence that the use of these programs is disproportionately less frequent for Indigenous offenders. The literature has pointed to the need for a closer examination of judicial practice and the discretionary powers exercised by corrections

officials, as well as the need for access to prison and community programs and the supportive and advocacy services essential to a wider and more effective application of justice for Indigenous people.

(c) Implications

Chapter five summarizes the implications for policies, operations and research gleaned from the review.

Much of the available research literature is unsatisfactory in a general sense because it looks at the interface between the Indigenous offender and the criminal justice system in terms of the individual and/or group characteristics of these offenders and not in terms of the criminal justice processes themselves. Relationships of dependancy and powerlessness are ignored in favor of focusing on areas where it is presumed Indigenous people have poorly adapted to the dominant culture. Even where some attention is given to those dominant group members who are prejudiced and discriminate, the specific emphasis remains on the differential characteristics of the Indigenous individual or group—a more sophisticated version of "blaming the victim." Given these assumptions it is not surprising that proposed solutions are couched in integrationist and assimilationist terms, and that reform policies tend to advocate the indigenization of criminal justice personnel and programs, in whole or in part, and/or the cross-cultural education of non-Indigenous personnel to sensitize them to the special differences and needs of Indigenous offenders. Thus, the literature in this area is noteworthy for the absence of comparative (i.e., Indigenous/non-Indigenous), contextual, multi-disciplinary

studies which would integrate the analytical framework of exploitation (i.e., the social, economic and over-involvement data) into a discussion of Indigenous people as an underclass in Canada (i.e., the historical role of capitalism and the state in creating the contradictions of underdevelopment).

With respect to law enforcement, here again Indigenous people, rather than the substantive law or police practices, are the object of analysis. Perhaps the most important facet of the relationship between Indigenous people and substantive law is the absence of recognition of traditional or aboriginal common law. The law itself is highly ethnocentric as are the sanctions it enables to be invoked and the means of adjudication it employs. It is, therefore, little wonder that law enforcement personnel are charged with the enforcement of inherently discriminatory laws and that law enforcement personnel do, in fact, enforce the law in discriminatory ways.

While the literature tends to support the view that law enforcement personnel hold negative views towards Indigenous people, very little of the empirical research specifically examines the impact of police discrimination on Indigenous people. Rigorous, comparative research is required on the nature, causes and results of police prejudice. The assumption that cross-cultural education has an amelorative impact on prejudice requires testing, as does the assumption that the indigenization of policing is beneficial or sufficiently beneficial in its existing form (i.e., tribal police or specfal constables). Much of the literature in this area is contradictory.

At the same time, police appear to be coercive substitutes for the adequate provision of other services (e.g., housing, health care, educational and recreational facilities). A question to be explored is whether less policing and equivalent or more expenditures on these other services would lead to less invovlement with the criminal process for both Indigenous and non-Indigenous people. It is also important to assess the types of intervention services which reserve and rural Indigenous communities require and, overall, to examine whether or not assumptions about policing in urban areas or in off-reserve rural areas are applicable to on-reserve policing. There is a lack of research literature that examines this question; most authors simply assume that policing reserves is the same as policing other areas. Furthermore, there is virtually no research on the Canadian experience with respect to local, community-controlled methods of law enforcement (including preventative services and support systems)other than policing, such as ombudspeople travelling with police patrols or independent police-citizen complaints procedures.

The chapter on Indigenous people in the criminal court process dealt with research on legal services, Native courtworkers, affirmative legal education, and the indigenization of the courts. With the exception of Native courtworker programs, there appears to be no research on the prosecution or defense processes and the biased discretion which may be exercised there.

Legal services are characterized by problems of inaccessibility, underutilization, lack of outreach and preventative educational programs,

lack of legal expertise, and language and cultural barriers. This is especially the case in rural areas where most Indigenous people live. Evaluative research has yet to yield a satisfactory model for delivering legal services for Indigenous peoples. It appears that a major problem is to secure Indigenous control or involvement in the formation of service delivery models. Services offering to handle both individual cases and those constructed around community organizing or development must be a requirement as well.

Insofar as Native courtworker programs are concerned, further research is required on the educational needs, roles and perceptions of users and managers of these programs. One study which interviewed courtworkers, courtworker service users, and other criminal justice personnel made numerous suggestions about ways of improving or augmenting the range of services offered by courtworkers. The expansion of courtworkers into family courts, for example, emerged as an almost unanimous demand. It is suggested that research in this area be replicated and extended because without such feedback the risk exists of simply recycling perceptions. In particular, data should be made available on the function and value of friendship centres (including user perceptions) in the context of this service. By disregarding the potential role of the centres as carriers of services offered to Indigenous people by Indigenous people an important aspect of policy formation has been ignored.

While there is of course no guarantee that Indigenous lawyers will work for Indigenous people, only a single piece of research specifically dealt with a program that encouraged Indigenous people to pursue a

legal education and it is debatable whether this program actually enhanced their success in law school. There has been some research into the means of assisting Indigenous people to enhance and realize heightened aspirations in the social sciences and health care, for example, but research in all areas of the administration of justice has not been a priority and, for that reason, seems urgently needed. Clearly the development of tribal courts has received little attention in Canada and only one study examined Native justices of the peace. A proposal for a model court or pilot project would seem a logical next step. While the issue of constitutional feasibility has been researched, other issues including jurisdiction, authority and status of court personnel, funding, and political independence have not been resolved.

There is evidence in every case of the issues discussed in the chapter on sentencing and over-representation that systematic, comparative data is needed on the socio-demographic profiles of both Indigenous (Indian, Metis, Inuit) and non-Indigenous populations (e.g., age, sex, socio-economic condition), as well as information on sentencing indicators (e.g., choice of sanction, sentence severity, the weight given to pre-sentence reports, and sentencing decisions by court location—rural/urban, on- and off-reserve). Because of inadequate data and enormous gaps in information in these areas, a common methodology in the literature has been to work backwards from data revealing high Indigenous prison admission rates. This has led researchers to variously focus on sentencing, or alcohol, or socio-economic conditions, or prison programs, and so on. The result has been to develop an extremely eclectic understanding of

the aetiology and specific dimensions of over-representation. For example, Canadian research literature contains almost no systematic data relating crime rates, drug abuse (including alcohol), and socio-economic conditions; yet each subject has received considerable attention as a distinct area of research. Thus, while there has been some attention to the link between drug abuse and socio-economic conditions this is not a well-developed area and certainly the link between crime and drug abuse deserves further research.

The research literature does tend to confirm the over-use of imprisonment for all offenders and, for Indigenous offenders, the existence of inappropriate sentences and institutional services in addition to the existence of differential charge, arrest and sentencing rates. While some attention has been paid to the issues of bias and abuse of discretionary powers as evinced in the individualization or subjective nature of sentencing, the exact nature of the influence of judicial and non-judicial decision-makers upon Indigenous people is not well-documented. In particular, very little is known about the rationales behind the discretionary decisions of the judiciary, and more extensive research should be encouraged on the influence which police, prosecutors, defence counsel, and probation and parole officers have in accounting for sentencing disparities. An important area still not adequately explored in Canada is the existence of differential north/south, rural/urban sentencing patterns. Within these contexts, the challenge to researchers is to establish whether any factors other than the nature and seriousness of the offence and the number of past offences (i.e., extralegal factors)

are creating biases in the sentencing process for Indigenous offenders.

A selected aspect of judicial practice and the choice of sanctions has to do with the use of fines and the imprisonment of fine defaulters. The appropriateness of fines for many Indigenous people seems highly questionable. This is especially the case when the consequence of non-payment is imprisonment; yet the persistence of jailing in default of fines as a Canadian problem is astounding. Relatively little research has been done on the use of fines and the extent to which time to pay is offered, their relevance to those fined and their dependents, and judicial appreciation of the regressive nature of fines for low-income people. Comparative data (i.e., Indigenous/non-Indigenous) data on the success of fine option, mediation-diversion, community service orders, and similar programs should be available.

Numerous criticisms have been levied against correctional and institutional programs including the inadequacy and irrelevance of services and facilities for Indigenous people; as well as the inappropriate assessment criteria for release on parole, temporary absence, and supervised probation; and the powers arbitrarily exercised by correctional personnel. Despite the long-standing concern about the over-involvement of Indigenous offenders in Canadian prisons, surprisingly little research is reported on programs designed for Indigenous prisoners or on alternative community programs. For example, we have no research literature which evaluates inmate self-help groups such as the Indigenous brotherhoods and sisterhoods which have developed within prisons. Much of the literature is preoccupied with reform proposals to adjust prison and

correctional program delivery systems by indigenizing corrections personnel and programs and/or sensitizing staff to Indigenous values without evaluating these efforts where they have been instituted and without evaluating the support they get from both the prisoners and the administration. Similarly, basic research is needed in order to have an inventory of appropriate supportive and advocacy services and resources which are available in the community as alternatives to custodial sentences. There is very little documented research on more recent options such as diversion and pre-trial programs, or on custodial alternatives in rural areas which tend to be particularly inadequate. It would seem important, for example, in view of the impending implementation of the Young Offenders Act, to document and assess the adequacy of facilities and services for Indigenous youth, as well as programs which could provide alternative measures for youth who will be held accountable under its provisions. There is also a need to know the specific effects the Young Offenders Act may have on Indigenous youth as compared to their situation under the Juvenile Delinquents Act.

Previous research on the impact of Canada's criminal justice system on Indigenous people has grossly overlooked the needs and concerns of Indigenous women. What little literature exists in this area, however, clearly indicates that they are even more over-represented in Canada's prisons than their male counterparts. Issues around Indigenous women and social justice should therefore be given priority.

Lastly, with notable exceptions, little research has been conducted by Indigenous people or commissioned for Indigenous people. Hence,

one can suggest that little of it is conceived in terms of the questions they might ask or the objects of research they might choose. We would therefore recommend support for the Social Sciences and Humanities Research Council's proposal to develop a Native Studies strategic research fund. Likewise, we believe the Departments of the Solicitor General, Justice, and Indian Affairs should provide funds for research and for the training of Indigenous people as researchers. This research aid should not be tied by the same contractual terms and methodologies exemplified in conventional research grants. Instead, research priorities should be determined with the full participation of Indigenous people; should focus on the users' needs; should enhance the research competence and capability of Indigenous people; and should be initiated, designed, and implemented by Indigenous people for Indigenous people.

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[1]Charles E. Reasons, "Native Offenders and Correctional Policy," *Crime and/et Justice* 4:4 (February 1977) 255; and William Ryan, *Blaming the Victim*, 2d ed. (New York: Vintage Books, 1976), pp.7-8.

[2]Oliver J. Brass. "Crees and Crime: A Cross-Cultural Study," mimeographed (Regina, Sask.: University of Regina, 1979), p.33.

INTRODUCTION

There has been growing interest and concern about the gross over-involvement of Canada's Indigenous peoples in all components of the Canadian criminal justice system. Although Indigenous peoples comprise only a fraction (3.5%) of the total Canadian population, by 1975 the situation had become a serious political embarrassment and a national conference was called by the federal Solicitor General Warren Allmand. In discussing the government's commitment Allmand observed that:

> *Our expectations of this conference are high, and so they should be. The right people are here. We share a determination to gain a better understanding of the problems we face and to move towards their solution.*[1]

This literature review is part of the ongoing processes of gaining an understanding of Indigenous peoples' problems within the criminal justice system and of examining possible solutions to these problems. The purpose of the review is to provide a critical assessment of the major research in this area and to identify directions for future research. Most of the material reviewed is Canadian, and most of the research studies have been completed during the last two decades. As well, almost all the research has been in the positivist tradition. The shortcomings of this approach are addressed in Chapter 1. A literature review which confines itself to this epistemological approach will not advance our understanding of the "problem" of Indigenous over-involvement with the criminal justice system or its "solutions." Therefore, this review attempts to recategorize the knowledge gleaned from the literature in such a way that this historic "problem" can be looked at differently.

We are suggesting that the over-involvement of Indigenous peoples with the criminal justice system is primarily a consequence of colonialism and resulting underdevelopment and that any attempt to serve Indigenous peoples more effectively will involve an appreciation of this political fact. Policy must, therefore, address itself to the macro-level of socio-economic planning, rather than attempt to improve the situation with adjustments at the micro-level of service delivery systems and programs.

This review analyzes the literature and discusses Indigenous peoples and the criminal justice system in the context of the theoretical framework outlined above. Chapter 1 examines the socio-economic conditions of Indigenous peoples and considers a number of attempts to identify the causes of these conditions. The second chapter looks at the specific impact of law enforcement on Indigenous peoples. In Chapter 3 the Canadian criminal court processes and court-related services for Indigenous peoples are reviewed, and alternative court systems are described. The fourth chapter discusses the explanations and implications of over-representation for correctional and prison programs with specific emphasis on the sentencing process. Chapter 5 summarizes the implications for policy and research gleaned from the research literature reviewed.

We have isolated a number of recurrent causal explanations and popular solutions which have emerged in the literature reviewed: (1) discretion/discrimination; (2) cross-cultural and public legal education; and (3) indigenization. Discretion/discrimination refers to the discretion discriminatorily exercised by police officers, judges and/or other criminal justice personnel in relation to Indigenous peoples. The

intent of cross-cultural education is to promote understanding between Indigenous and non-Indigenous peoples while public legal education for Indigenous peoples is directed towards those who do not understand the legal system. Indigenization refers to the performing of services for Indigenous peoples by Indigenous peoples such as Native Courtworker Services or RCMP Native Special Constables.

There are also recurrent issues in the literature:(1) that Indigenous peoples are the most socio-economically disadvantaged group in our society;(2) that they do not receive the socio-economic-legal benefits promised by Canadian law because of cultural ("blaming the victim"), logistical, financial, and administrative barriers;(3) that within all systems delivering services, Indigenous peoples feel their special status under the constitution should be recognized; and (4) that Indigenous peoples prefer a community rather than an individual focus in the delivery of socio-legal-economic services/programs.[2] These themes and issues are common to most of the literature reviewed and are discussed within the theoretical framework outlined above.

NOTES TO INTRODUCTION

1. Canada, Ministry of the Solicitor General, Communication Division, *Native Peoples and Justice: Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, both held in Edmonton, Feb. 3-5, 1975* (Ottawa, Ont.: Information Canada, 1975), p.3.

2. Canada, Indian and Northern Affairs, Research Branch, Policy, Research and Evaluation Group, *Native People and Canada's Justice System: Programmes and Issues*, vol.2, by Gail Michalis and William T. Badcock (Ottawa, Ont.: Indian and Northern Affairs, 1979), p.9.

CHAPTER 1: COMPETING EXPLANATIONS FOR THE OVER-INVOLVEMENT OF INDIGENOUS PEOPLES WITH THE CRIMINAL JUSTICE SYSTEM

The Dimensions of the Adversity under Which Indigenous Peoples Live

A useful but neverthless limited review of issues affecting Indigenous peoples in the criminal justice system is Michalis and Badcock's *Native People* (1979). They suggest that the "underlying issues" or causes accounting for over-involvement of Indigenous peoples in the criminal justice system are because,

> *in a socio-economic sense, Native people are the most disadvantaged group of any population segment in Canada [and] because of a combination of cultural, jurisdicational, logistical, financial and administrative barriers, the Native people of Canada often do not receive the socio-economic-legal benefits promised by Canadian law.*[1]

The first assertion in the above statement is more than adequately borne out by other data described in *Indian Conditions: A Survey*[2] which documents the social, economic, and political conditions in which Indians live in Canada. Findings are limited, however, since the survey simply describes these conditions without analyzing them.

The purpose of the *Survey* was to summarize the available information on changes in Indian conditions, to compare Indian peoples with the rest of the population, and to provide a perspective on necessary changes in government policies, programs and services. Its intent was to provide empirical support for discussions leading to revisions of the Indian Act, for adjustments to the management and delivery of social and economic programs, and for the redefinition of an Indian socio-economic strategy in Canada.

Even a small sample of the data contained in the *Survey* reveals the extent of the adversity Indigenous peoples suffer because of the various barriers to their full enjoyment of the socio-economic-legal benefits promised by the Canadian state. The *Survey's* summary data on economic conditions, for example, concludes:

> *The resource potential of the reserve land base is generally comparable to the capacity of other land in Canada. However,*
>
> - *the resources have not been developed*
> - *45% is relatively inaccessible*
> - *blocks of land do not necessarily form economic units*
> - *distribution of productive land does not correspond to population distribution.*[3]

Similar summary data on social conditions in the *Survey* provides further evidence of the disadvantage faced by Indigenous peoples.

> *...It appears that there has also been an increase in social problems among on-reserve Indians including high rates of alcohol abuse and welfare dependency. For example:*
>
> - *Life expectancy, a reflection of health standards, is still ten years less than the national population.*
> - *Violent deaths are three times national levels; suicides particularly in the 15-24 age group, more than six times national rates.*
> - *The strength and stability of family units appear to be eroding, with higher divorce rates, more births outside marriage, and more children in care.*
> - *In 1964, an estimated 36% of the Indian population received social assistance; by 1977-78 between 50 and 70 percent received social assistance.*
> - *One in three families lives in crowded conditions. 11,000 new homes are required and 9,000 need repair. Less than 50 percent of Indian houses are properly serviced, compared to a national level of over 90 percent.*[4]

The *Survey* also catalogues data on crime and provides the most contemporary index of over-representation of Indigenous peoples with the criminal justice system.

> *Indians and other natives are over-represented in relation to their share of the population in both federal and provincial prisons. About 9 percent of the prison population is Indian or native, compared to an estimated 3 to 3.5 percent share of the national population.*
>
> *In Manitoba, Saskatchewan, and the north, Indians and other natives represent upwards of 40 percent of the population in jails and penitentiaries....*
>
> *The high levels of Indian juveniles considered delinquent (almost three times the national rate) is consistent with the high proportion of Indian children living off reserves, out of their home communities.*
>
> *A lower proportion of native children are let off with a warning than the national rate (15 percent compared to 46 percent) and consequently more are charged or referred.*[5]

Indian Conditions: A Survey, while assembling quantitative data, provides little or no coherent explanation of the phenomena it describes. It attempts, however, to draw out "implications" from the data. For example:

> . *High Indian representation in jails represents a conflict between Indian and non-Indian values.*
>
> . *Indian offences mirror poor social and health conditions on reserves.*
>
> . *High levels of Indian juvenile delinquency, high levels of young suicides and the large number of children in care suggest that deteriorated family and social conditions are having the greatest effect on Indian youth.*
>
> . *High representation in jails and juvenile courts also reflect the scarcity of preventive services and of support systems for Indians as alternatives to jail.*[6]

These "implications" reflect one approach to defining the "problem"/"solution" to the over-involvement of Indigenous peoples with

the criminal justice system. Inherent in this approach is an order/assimilationist world view which is found in much of the literature reviewed and which follows from a positivist approach to problem-definition and problem-solution. It explains powerlessness in terms of a "conflict of values," "culture of poverty," and/or "poverty cycle" theories. It "blames the victim" rather than the system and allows an analysis of causes or problem-definitions to remain on the descriptive, symptomatic level. Our review will attempt to move beyond these forms of analysis but first it is worthwhile to look at the various theoretical approaches to problem definition.

"Problem-Definition": Understanding the Phenomenon

An omnibus definition of the term "social problem" is useful since it illustrates both the value and the poverty of the problem-solution conceptualization.

> *A social problem is a condition affecting a significant number of people in ways considered undesirable and about which it is felt something can be done through collective social action.*[7]

This definition, because it assumes "something can be done through collective social action," is useful to a government which has a virtual monopoly on problem-solution resources or, at least, a government which assumes it should play a significant part in problem-solution.

Problem-Definition and Positivism

An order/assimilationist premise on the relationship between non-Indigenous and Indigenous peoples is based on a positivist perspective. Reasons summarizes the assumptions of the order/assimilationist analysis as follows:

> *The order/assimilationist perspective minimizes the significance of power and coercion in everyday life between subordinate and superordinate groups, emphasising the social psychology of individual and group adaption to dominant group values and practices. Society is viewed as made up of competing individuals who carry out their competition within the context of neutral social institutions. Thus everyone is equal and has equal opportunity.*[8]

In much of the work reviewed it is assumed that all individuals in society are equal and compete in neutral social institutions. As critical criminologists Taylor, Walton and Young have pointed out,

> *for the politician and the planner, positivism provides a model of human nature which in its consensual aspects, allows the world 'as it is' to remain unquestioned and, in its determinist notion of human action, offers the possibility of rational planning and control.*[9]

Only a small fraction of the research literature challenges the world "as it is." Verdun-Jones and Muirhead describe this problem.

> *The majority of studies have focused upon a number of decision-making points in the criminal justice process without making any effort to relate the findings to the broader context of the status of native peoples in Canadian society. What is required is a more comprehensive, multidisciplinary and integrated focus which would draw together a number of perspectives. The involvement of native peoples with the criminal justice system must be viewed in light of the history of their colonial status vis-a-vis the dominant white society and their present socio-economic situation.*[10]

An example of this lack of integration is the fact that although alcohol and poverty are ubiquitous themes in the criminological literature, few sources go beyond documentation to an explanation of causes and possible solutions. Documenting over-involvement of Indigenous peoples in the criminal justice system, consisting as it often does of a detailed quantitative description of the phenomenon, is important in providing baseline data on the extent of their involvement. However, it is likely that little additional knowledge will be gained unless there is an

attempt to reconceptualize the nature of the phenomenon and its origins in terms of "blaming the victim" ideology, conflict theory, and the development of underdevelopment.

Problem-Definition and "Blaming the Victim" Ideology

An analysis that "blames the victim" reasons that:

> *...problems of racial and ethnic relations are largely a product of members of subordinate racial and ethnic groups who need to become adapted to the dominant group culture. While attention is given to problems of the few dominant group members who are prejudiced and discriminate, much effort is directed toward the analysis of racial and ethnic group members and their problems. For example, white-native relations are viewed as the "Indian problem" from this perspective, with specific attention given to the characteristics of natives, interpreted as evidence of their lack of adequate socialization and assimilation, anomie, etc.* [11]

William Ryan's classic work, *Blaming the Victim*,[12] contains an extensive critique of this ideology and of the problem-definition process which underpins it. "Blaming the victim" ideology:

> *...attributes defect and inadequacy to the malignant nature of poverty, injustice, slum life, and racial difficulties. The stigma that marks the victim and accounts for his victimization is an acquired stigma, a stigma of social, rather than genetic, origin. But the stigma, the defect, the fatal differences—though derived in the past from environmental forces—is still located within the victim....It is a brilliant ideology for justifying a perverse form of social action designed to change, not society, as one might expect, but rather society's victim.* [13]

This critique equips us with a means for examing proposals in the literature which do not go beyond the victim or service delivery systems in their recommendations for change or solutions to problems. Ryan continues his critique, warning that:

> *The second step of applying the [blaming the victim] explanation is to look sympathetically at those who*

> *'have' the problem in question, to separate them out and define them as a special group, a group that is different from the population in general...that difference is in itself hampering and maladaptive. The Different Ones are seen as less competent, less skilled, less knowing—in short, less human.*[14]

This is precisely the methodology found in *Indian Conditions: A Survey* and implicitly used by Michalis and Badcock. In our review, Indigenous peoples are separated into a distinct group, but only to examine their over-representation in the criminal justice system. However, to properly understand the phenomenon we must look at the whole of society, to determine how society "as it is" contributes to, or causes Indigenous over-involvement. The problem-definition-solution process which "blames the victim" in the process of conceptualizing the problem is inadequate in our view.

Problem-Definition and Conflict Theory

Penetrating critiques of positivist assumptions and approaches to research are found in the works of Reasons,[15] and Verdun-Jones and Muirhead[16] who have addressed the over-involvement of Indigenous peoples in the criminal justice system from the standpoint of conflict or critical theory. They point out that the structure of power relationships resulting from colonization is such that Indigenous peoples are the underclass, i.e., the colonized. Verdun-Jones and Muirhead isolate the role of the criminal justice system in terms of the social control functions it performs for powerful economic groups. These groups operate in collaboration with or under the protection of the state. Colonization, industrialization, and modernization are aspects of the pursuit and accumulation of wealth which brought Europeans to

North America. The criminal justice system has traditionally facilitated these processes by making such activity safe.

> *From the structuralist perspectives, the CJS[Criminal Justice System], and its components, are clearly institutions of formal social control. They embody the crystallized 'power' of the state, and the law clearly reflects the underlying socio-economic organization of the state—currently 'technological/industrial capitalism.' Canadian law is conducive to the operation of the multi-national 'ownership' of Canada's industrial productive capacity. In delivering criminal justice within North America, the correctional system acts to minimize the obvious dysfunctional effects to the dominant social order produced through the inclusion of the native population within the Canadian criminal justice system. Unless the underlying structures are also subject to 'control,' then the correctional system is actually playing an accommodating role in world industrial capitalism.*[17]

This structural perspective summarizes a world view which differs from that of positivism. Data from *Indian Conditions: A Survey* provides irrefutable support for the view that the dominant segments of society have had a very profound impact on the way of life of Indigenous peoples.

The Development of Underdevelopment

In order to avoid "blaming the victim" we are attracted by literature that explains social problems in terms of the dynamic created through the exercise of economic power between developed and underdeveloped regions, i.e., north and south, west and east, centre and periphery, or metropole and hinterland. Unfortunately, this approach has not filtered significantly into the aetiological explanations of the over-involvement of Indigenous peoples in legal processes. Prominent authors using underdevelopment theory include

Samir Amin (*Unequal Development*, 1976); Andre Gunder Frank (*Dependent Accumulation and Underdevelopment*, 1979); and James Petras (*Critical Perspectives on Imperialism and Social Class in the Third World*, 1978). Although this report will not attempt a thorough review of their work, we believe any real understanding of the plight of Indigenous peoples and their involvement with the criminal justice system requires the recognition of how the "development of underdevelopment" has been built into the policy formulation process.

These authors argue that, historically, over-involvement with the legal system was endemic to the relationship between the colonized (Indigenous) and the colonizer (non-Indigenous) and that this relationship was and is one involving economic, political, and social exploitation or social dislocation. The legal system is an integral part of this exploitation and plays a role in maintaining the position of the dominant political and economic groups. As J.L.T. James points out, *"The criminal justice system exists to preserve the basic values of our culture."*[18] Therefore, Indigenous peoples who come into contact with this system are often the losers.

Elias, Frideres and Watkins[19] employ the colonial or underdevelopment model for the analysis of relationships between non-Indigenous and Indigenous peoples. Verdun Jones and Muirhead[20] have briefly incorporated the underdevelopment thesis into their review of the "Natives and Justice" literature. Gail Kellough[21] is one of the few authors available for review who makes a serious attempt to integrate the analytical framework of exploitation into a discussion of Indigenous peoples in Canada.

> *The colonial parallel of 'developed underdevelopment' clearly operates in Canada....The deterioration of Indian reserves and resources has clearly benefited both lower level metropoles in Canada and international ones in the U.S. Economic imperialism can be charged when 'the formal or informal control over local economic resources (operates) in a manner advantageous to the metropolitan power, and at the expense of the local economy.'*[22]

She argues that,

> *in most cases, Indian reserves have been at the bottom of the Canadian hinterland ladder; when communities other than reserves form this lower level hinterland, native Indians form the underclass within that community, an underclass of unemployed who are incorporated in the structures and processes of local capitalism.*[23]

It is this type of analysis which can then be used to explain the "problem" of Indigenous over-involvement in the criminal justice system. It provides the links between the economic and social conditions data, which the *Indian Conditions: A Survey* has assembled, and the over-representation of Indigenous peoples in the criminal justice system.

Few writers consciously use the analogy between the "underdeveloped" countries of the Third World and Canada's Indigenous peoples. Havemann's[24] article on legal services attempts to integrate these perspectives in order to explain the poor portability of anti-poverty programs imported from deindustrializing situations to underdeveloped ones. Harding's[25] work is also particularly useful in that it makes a unique contribution by linking alcohol use, underdevelopment, and the over-development of Indigenous peoples in the criminal justice system. While other authors have noted alcohol and its link to crime as a

ubiquitous theme, virtually none of the literature goes beyond the descriptive, or individualized disease model of alcoholism.

Underdevelopment and Urban Migration

The migration of Indigenous peoples to urban centres is a factor in their over-involvement in the criminal justice system; that is, urban migration is a basic symptom of the development of underdevelopment. Industrialization dislocates Indigenous peoples, forcing them to urban centres. Petras defines this process as modernization. In Central and South America this involves:

> *...the conversion of an autonomous agro-subsistence economy to a dependent, non-industrial society whose major characteristics include a class structure with a preponderance of bureaucratic, commercial, and "low-paying service" occupations linked to the metropolitan ruling class and its military-administrative institutions....The selective insertion of western technology within the periphery has created a new stratum of industrial workers but has undermined the crafts and subsistence farmers, driving them into cities and sub-urban slums as migrant laborers.*[26]

Both by analogy and through specific data the anthropological and sociological literature documents well both the process of urban migration and the consequences of moving to urban centres for Indigenous peoples. The most notable works in this category are probably those of Hugh Brody (*Indians on Skid Row*, 1971); Jim Frideres (*Canada's Indians: Contemporary Conflicts*, 1974); and Edgar Dosman (*Indians: The Urban Dilemma*, 1973). These authors support the thesis that urban migration resulting from modernization in the context of the underdevelopment of Canada's hinterland regions is a central process in the criminalization of Indigenous peoples. Underdevelopment of the

hinterland involves rapacious economic growth for the benefit of the metropole. Mining, related hydro-electric power and farming, historically, are major examples of the type of activity which can totally dislocate Indigenous communities. These communities already lack the land base to enable them to pursue "traditional" livelihoods. Overpopulation presents serious problems which delayed land entitlement settlements exacerbate. Data from *Indian Conditions: A Survey* confirms the demographic dimensions of the development of underdevelopment. In examining urban migration, for example, the *Survey* states that:

> *there has been a rapid increase in the total number of Indians living off reserves since 1965 (a trend which is expected to continue at a more-or-less steady rate). As a proportion of the total Indian population, it increased from 18 percent in 1960 to just under 30 percent in 1975, where it appears to have stablized.*[27]

The *Survey*, nevertheless, confirms the location of most Indigenous peoples in the hinterland.

> *Seventy-one percent of all bands representing 65 percent of the total registered Indian population, are situated either in rural or remote locations. This compares to less than 25 percent of the national population living in rural areas.*[28]

The Berger report[29] deserves considerable attention from policy-analysts and formulators. It implicitly acknowledges the development of underdevelopment and the extremely negative effect this has had on Canada's Indigenous peoples "North of 60." Almost everything in this unique report could be a description of what has happened in southern Canada over the last one hundred and fifty years. In his discussion

of "Crime and Violence" Berger states:

> *I am persuaded that the incidence of these disorders is closely bound up with the rapid expansion of the industrial system and with its persistent intrusion into every part of the native people's lives. The process affects the complex links between native people and their past, their culturally preferred economic life, and their individual, familial and political self-respect. We should not be surprised to learn that the economic forces that have broken these vital links, and that are unresponsive to the distress of those who have been hurt, should lead to serious disorders. Crimes of violence can, to some extent, be seen as expressions of frustration, confusion and indignation, but we can go beyond that interpretation to the obvious connection between crimes of violence and the change the South has, in recent years, brought to the native people of the North. With that obvious connection, we can affirm one simple proposition: the more the industrial frontier displaces the homeland in the North, the worse the incidence of crime and violence will be.*[30]

Underdevelopment and Alcohol

The impact of alcohol upon Indigenous peoples is well documented in the criminological literature.[31] As *Indian Conditions: A Survey* states:

> *Officials working in health services for Indians estimates that between 50 and 60 percent of Indian illnesses and deaths are alcohol-related.*
>
> *A Saskatchewan study shows that between 1970 and 1975 hospital admissions for alcohol psychosis and alcoholism for on-reserve Indians in the 25-55 age group were 5 times the national rate. The rate for on-reserve Indians was 2 to 3 times that of off-reserve Indians.*
>
> *Because of lack of data, it is not known if the problem is stable or becoming worse.*[32]

But neither the *Survey* nor most of the other literature we reviewed

links the use of alcohol with underdevelopment.

One writer who does make this link is Jim Harding. His analysis avoids "blaming the victim" and cautions against using racially specific views or disease model diagnoses. His work suggests that community stresses among non-native communities on the frontiers of corporate expansion contribute to a disproportionate rate of arrests for alcohol-related offences.

> *Though blatant and subtle racial 'explanations' of community problems in the far north are equally erroneous, they have survived because they have had a clear ideological function. If social problems can be explained by referring to race, there is no need to look at historical and economic conditions. This supports those who try to equate development with corporate expansion, since the concrete impact of such expansion on communities gets ignored. Instead of assessments of social impact we get generalities and rhetoric about 'northern development' and racist innuendo about the underdevelopment of people of Indian ancestry.*[33]

The connection between alcohol and involvement with the criminal justice system must be examined by studying the relationship between alcohol, regional underdevelopment, and its social impact. Underdevelopment creates enormous stresses and contradictions and alcohol is used as a means of managing this alienation by assisting people to modify their moods and thereby escape their real-life situations. In addition, many writers point out that alcohol use is greatly facilitated by a state-sponsored market place which derives tremendous revenue from alcohol sales.[34]

We would, therefore, conclude this discussion by encouraging

policy formulators and analysts to transcend conventional "blaming the victim" and disease model explanations linking alcohol and the criminal activity of Indigenous peoples. The connections between alcohol use by Indigenous peoples and the criminal justice system can better be understood by examining the contradictions that Indigenous peoples encounter as part of the process of underdevelopment.

NOTES ON CHAPTER 1

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3. Ibid., p.4.

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5. Ibid., pp.37-38.

6. Ibid., p.39.

7. Paul B. Horton and Gerald R. Leslie, *The Sociology of Social Problems*, 3rd ed. rev. (New York: Appleton-Century & Crofts, 1978), p.4.

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9. Ian Taylor, Paul Walton, and Jock Young, *The New Criminology: For a Social Theory of Deviance* (London: Routledge & Kegan Paul, 1973), p.35.

10. Simon N. Verdun-Jones and Gregory K. Muirhead, "Natives in the Canadian Criminal Justice System: An Overview," *Crime and/et Justice* 7/8:1 (1979/80) 18.

11. Reasons, p.255.

12. William Ryan, *Blaming the Victim*, 2d ed. (New York: Vintage Books, 1976).

13. Ibid., pp.7-8.

14. Ibid., pp.9-10.

15. Reasons, p.255.

16. Verdun-Jones and Muirhead, pp.3-21.

17. Ibid., p.5.

18. J.L.T. James, "Toward a Cultural Understanding of the Native Offender," *Canadian Journal of Criminology* 21:4 (October 1979) 461.

19. Peter Douglas Elias, *Metropolis and Hinterland in Northern Manitoba* (Winnipeg, Man.: The Manitoba Museum of Man and Nature, 1975); James S. Frideres, *Native People in Canada: Contemporary Conflicts*, 2d ed. (Scarborough, Ont.: Prentice-Hall, 1983); and Mel Watkins, ed., *Dene Nation: The Colony Within* (Toronto, Ont.: University of Toronto Press, 1977).

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21. Gail Kellough, "From Colonialism to Imperialism: The Experience of the Canadian Indians," in *Structured Inequality in Canada*, eds. John Harp and John R. Hofley (Scarborough, Ont.: Prentice-Hall, 1980).

22. Ibid., pp.351-352.

23. Ibid., p.349.

24. Paul Havemann, "The Regina Native Counsel Project: A Civilian Perspective on the Delivery of Legal Services to People of Indian Ancestry in the City," *Canadian Legal Aid Bulletin, Native People and Justice in Canada, Special Issue, Part 1* 5:1 (January 1982) 69-92.

25. Jim Harding, "Development, Underdevelopment and Alcohol Disabilities in Northern Saskatchewan," *Alternatives* 7:4 (Autumn 1978); and "Managing Social Contradictions Through Drugs," mimeographed (Regina, Sask.: Faculty of Social Work, University of Regina, n.d.). This paper has also been published under the same title in *Contradictions in Canadian Society: Readings in Introductory Sociology*, ed. John A. Fry (Toronto, Ont.: John Wiley & Sons, 1983).

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27. *Indian Conditions: A Survey*, p.11.

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29. Mr. Justice Thomas R. Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry, Vol. 1* (Toronto, Ont.: James Lorimer & Co., 1977).

30. Ibid., p.152.

31. See, for example, Berger (note 29); Canada, Department of Indian Affairs and Northern Development, Northern Science Research Group, *Indians on Skid Row*, by Hugh Brody (Ottawa, Ont.: Information Canada, 1971); Canada, Ontario Ministry of Correctional Services and Ontario Native Council on Justice, *The Native Inmate in Ontario*, by A.C. Birkenmeyer and S. Jolly (Ont.: Ontario Ministry of Correctional

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32. *Indian Conditions: A Survey*, p.21.

33. Harding (1978), p.33.

34. See, for example, Ibid., pp.26-27; and Ontario Native Council on Justice, *Inquiry into Revenue Gained by the Province of Ontario and the Government of Canada from the Sale of Alcohol to Native People*, by Linda Vedan (Toronto, Ont.: Ontario Native Council on Justice, 1980).

CHAPTER 2: LAW ENFORCEMENT AND INDIGENOUS PEOPLES

Introduction

In chapter 1 competing explanations for the over-involvement of Indigenous peoples in the criminal justice system were analysed. In this current chapter literature related to the impact on Indigenous peoples of a specific aspect of the criminal justice system—the process of law enforcement—is reviewed. Before developing a model with which to examine the law enforcement literature it is essential to recognize that *"any analysis of a law violation should begin with an analysis of the law itself."* [1]

Clarke and Barnhorst define law as *"that body of rules which regulates the conduct of members of society and is recognized and enforced by the government."*[2] Graham Parker describes how this regulation of conduct was viewed in the 18th century and how it is enforced today.

> *When the English jurist Blackstone wrote his Commentaries in the eighteenth century, he was convinced that the law was the 'perfection of reason' and what was contrary to reason was not law.*
>
> *In contrast, adherents of the new criminology would argue that the law is not democratically formulated and it is enforced in such a way that the poor and the powerless are victimized by the criminal justice system. The history of the law, particularly in the past three hundred years, suggests that the latter view is more accurate. Authority has invariably constructed laws and institutions to control the 'deviant'—the poor, the orphan, labourers trying to organize themselves, the delinquent, the heretic, the non-conformist, the epileptic, the mentally disturbed and the criminal.*[3]

From the viewpoint of Indigenous peoples most laws in Canada are those of the colonizer although, as a result of struggle by the colonized, some laws have changed. The types of struggles that Indigenous peoples have waged can be seen in their fight for aboriginal and treaty rights and for the striking of discriminatory clauses from the Indian Act. Status Indians, for example, did not win the right to vote until 1960.

As documented in the previous chapter, Indigenous peoples are often economically disadvantaged. The poor are usually more visible on the street and, therefore, more vulnerable to intervention by law enforcement personnel. P.J. Giffin (1966)[4] raises the point that the law distinguishes between identical conduct based on whether it is performed in private or public. For example, drunks who can supply an address are often driven home while homeless, unattached drinkers are more likely to be arrested. The author also points out that public intoxication laws and vagrancy laws converge because of their shared assumptions:

> *The 'idle rogues and vagabonds' at which such laws have for centuries been aimed have been seen as a threat to the community precisely because they are detached from normal social controls, aliens who are dangerous because they have nothing to lose.*[5]

It is not difficult to illustrate the extent to which both the substantive law and the law enforcement system discriminates against the poor of whom Indigenous people make up a disproportionately large group. Douglas Schmeiser's example of the discriminatory nature of the Migratory Bird Convention Act is a case in point.

> *It is ironic that the open season comes at a time when migratory birds have already left the Northwest Terri-*

> *tories, and as a result northern Indians and Eskimos are deprived of a source of food which they require to maintain a proper diet. When one compares the application of such a rule in the North with the slaughter of game birds on the prairies by farmers to protect their crops, the law appears very discriminatory indeed.*
>
> *Some of the circumstances where prosecutions have been launched were pathetic. In R.v. Sikyea, the facts were as follows:*
>
> *On May 7, 1962, not far from Yellowmife [sic] airport in the Northwest Territories, the respondent was arrested by a constable of the R.C.M.P. shortly after he had shot a female mallard duck. The respondent admitted shooting the duck but stated that he did not know that he was not to shoot ducks out of season.*
>
> *The respondent is an Indian and member of band No. 84 under treaty 11. He had contracted tuberculosis in 1959 and had been sent out to Edmonton for treatment. Since his return he had been unable to work and he and his family had been receiving welfare assistance. On this day he was on his way out to the bush to see if he was able to do his customary work. He had taken his tent, gun, and muskrat traps and was planning to trap muskrats. He expected to be away two or three weeks. He had taken no food, expecting to shoot game. He shot the duck for food.*
>
> *Despite these circumstances, the accused was duly convicted by the Supreme Court of Canada....*[6]

The Problem-Definition/Solution Model

As discussed previously, the model utilized to analyze the literature derives in part from the clear statement of issues presented by Michalis and Badcock. They argue that due to socio-economic disadvantage and because of cultural, jurisdictional, logistical, financial, and administrative barriers, Indigenous peoples often do not receive the benefits promised to them in the Canadian constitution. A further component is the systems model of criminal justice which involves "inputs" and "outputs." Police and law enforcement agencies are at the

"input" end of the system defining the population with which the rest of the criminal justice system deals. Corrections can thus be seen as a passive receptacle for the outcomes of discretionary activities exercised at a large number of decision points throughout the system. The offender who pays his or her dues or serves time is the output. The success of the "system" is measured frequently in terms of the quality of its "output," i.e., recidivism rates.

Dimensions of Law Enforcement

According to the Solicitor General's *Selected Trends in Canadian Criminal Justice* (1979), *"nearly two-thirds of expenditures in criminal justice are devoted to policing."*[7] This compares with *"one-fifth...to adult corrections and one-tenth to court services [and] ... very small expenditures...made for legal aid and direct compensation to victims...."*[8] By comparison, Bradford W. Morse has pointed out that in rural areas where most Indigenous people live there are even more law enforcement personnel but fewer legal services.[9] The Yukon and the Northwest Territories have a much higher number of police per capita than any other area in Canada (see Table 1), and Saskatchewan, the province with the largest Indigenous population in southern Canada, has the second highest rate. Per capita expenditures on policing are also much higher in the hinterland (see Table 2).

These data reveal the role of social control in the underdevelopment process. Expenditures for federal and municipal police in the

Table 1 Rate Per 1,000 Population of Full-Time Police Officers, (1) by Province 1978-1980

	1978	1979	1980
Newfoundland	1.5	1.6	1.5
Prince Edward Island	1.7	1.5	1.6
Nova Scotia	1.6	1.7	1.7
New Brunswick	1.8	1.8	1.8
Quebec	2.4	2.4	2.4
Ontario	2.3	2.3	2.3
Manitoba	2.1	2.1	2.2
Saskatchewan	2.4	2.3	2.8
Alberta	2.2	2.2	1.9
British Columbia	2.0	2.0	2.0
Yukon and Northwest Territories	4.7	4.8	4.9
CANADA	2.2	2.2	2.2

1. Excludes Police Cadets.

Source: Canada. Statistics Canada, Canadian Centre for Justice Statistics. "Juristat: Service Bulletin: Ottawa:Minister of Supply and Services Canada 1:1 (October 1981) p.3.

Table 2

Police: Per Capita Expenditures 1977-78, by Level of Policing

	Nfld.	P.E.I.	N.S.	N.B.	Quec.	Ont.	Man.	Sask.	Alta.	B.C.	Yukon	N.W.T.	Canada
Federal Police	2.24	2.63	2.89	2.45	3.27	3.16	3.06	2.76	2.78	5.99	7.43	4.23	3.39
Provincial Police	27.15	22.78	15.81	17.14	20.88	15.84	18.77	28.42	17.10	18.26	156.96	204.44	19.03
Municipal Police	12.63	11.94	18.64	20.44	42.92	42.85	29.98	27.31	36.52	38.74	0.0	0.0	38.17
TOTAL	42.02	37.35	37.34	40.03	67.07	61.85	51.81	58.49	56.40	62.99	164.39	208.67	60.59
Percent Variation From National Average	-31	-38	-38	-34	11	2	-14	-3	-7	4	171	244	0

NOTE: Excludes $217,050,000 expenditures by federal government for other R.C.M.P. services and approximately $70 million spent on other police related services.

Source: Canada, National Task Force on the Administration of Justice, *Justice Services in Canada 1977-78*, Canada, National Task Force on the Administration of Justice, August 1979. p.41.

Yukon and the Northwest Territories are 171 and 244 times higher than average policing expenditures, respectively. It appears that in the hinterland there is a greater chance of contact between Indigenous peoples and police officials, given the higher ratio of police to general population and the role of the police as "gatekeepers" to the criminal justice system. There are also fewer R.C.M.P. Native Special Constables in the North.

Law Enforcement and the Over-Involvement of Indigenous Peoples

One problem-definition/solution model conceptualizes the over-involvement of Indigenous peoples with the criminal justice system as, in part, a result of discriminatory policing exercised in a manner which is negatively biased against Indigenous peoples. The solution, outlined in most of the literature, requires that law enforcement agencies exercise positive discretion towards Indigenous peoples. The promotion of this positive discretion has three basic thrusts: (1)cross-cultural education to promote understanding between the Indigenous and non-Indigenous peoples; (2)legal education for Indigenous peoples so they are less vulnerable to the abuse of their rights and so that they will know the law and therefore obey it; and (3) the "indigenization" of policing through either the affirmative hiring of Indigenous peoples to work as police in regular police forces (either as regular members or as special constables), or through the transfer of law enforcement to Indian bands (autonomous tribal policing). The literature to which

we were able to gain access consisted mainly of evaluations of "indigenization" as well as a limited number of studies of cross-cultural education.

Biased Discretion or Conspicuous Criminality?

The classic document *Indians and the Law* (1967) states the general proposition that:

> *underlying all problems associated with Indians and Eskimos in this country are the prejudice and discrimination they meet in the attitude of non-Indians.*[10]

The report, however, does not link this discrimination to policing practices. Assumptions about the consequences of underdevelopment are evident in the report but "blaming the victim" is the more obvious ideology. This occurs, for example, in the description of police/Indigenous relationships in the hinterland.

> *In general, relationships between the police and the Indian people in these parts of Canada [B.C., the Prairies, and Territories] are less amicable and, in many areas, have reached a stage where bitterness prevails on both sides. This is particularly true where police officers have rural detachments containing many Metis settlements or Indian reserves. The constant surveillance sometimes required by the Indian and Metis people can, under these circumstances, harden into open dislike on the part of police.*[11]

Stating that Indigenous peoples require constant surveillance obviously "blames the victim." Social and other conditions on reserves, such as economic powerlessness, are not examined to explain why the police feel that this surveillance is necessary. The description of the relationship between Indigenous peoples and police in the metropole even more clearly illustrates the "blaming the victim" ideology found

in the report.

> *It is also obvious that the Indian people, particularly in cities, tend to draw police attention to themselves, since their dress, personal hygiene, physical characteristics and location in run-down areas make them conspicuous. This undoubtedly results in more frequent arrests.*[12]

The report argues that Indigenous peoples draw police attention to themselves. Indigenous peoples, rather than police actions, are the object of the analysis and urban social structures are not examined.

Both Greenaway and Giffin agree that over-involvement stems in part from the location and conspicuous nature of Indigenous peoples in urban areas. However, both have shifted their focus to the police. Greenaway suggests that,

> *to a degree at least, crime and delinquency are 'found' among the poor because that is where they are sought and the poor have little ability to resist intrusion.*[13]

And Giffin argues that:

> *The police have considerable discretion in the use they make of public intoxication laws, as the offence of drunkenness in a public place itself is very common and the initiative in making an arrest almost always lies with the police officer. The choice of arrestees is a sampling procedure, but a random one....*[14]

A report contemporary to *Indians and the Law* is the *Administration of Justice in the Hay River Area of the Northwest Territories* by Mr. Justice Morrow. It concluded:

> *...there has not been any discrimination in the true sense against the Indians or Metis population, but that in the basic and general administration of each of the respective areas, both the Justice of the Peace and the Royal Canadian Mounted Police have treated Indians, Metis, and whites or others without favour or bias.*[15]

Justice Morrow does not define what he means by discrimination in the "true sense." Presumably this means no overt discrimination. Yet further on he makes the following statement:

> *The unmarried female Indian or Metis may be suspected of raising the fine by prostitution so [she is] less likely to be fined—in the belief that a jail term is safer for her.*[16]

Thus his claim that there is no discrimination is questionable since Indigenous females are singled out, and it is assumed that they will raise their fines by prostitution.

Other Canadian and American literature tends to support the view that law enforcement personnel hold negative views towards Indigenous peoples.[17] But because very little Canadian empirical research specifically examines the impact of police discrimination on Indigenous peoples, there are a number of questions the research literature may not be able to answer:

(1) How does discretion on the part of police officers affect the decision of whether or not to arrest?

(2) In the delivery of police services do police perform more or less of a "social work" role with Indigenous peoples than with non-Indigenous populations?

(3) What role, if any, should organizations looking into complaints about police actions play?

(4) What function does the complaint process perform?

These are program and policy issues which have not received must attention in the research literature. In addition, there is a need for research on discretionary guidelines in police organizations.

The literature in the area of biased discretion or conspicuous

criminality does not specifically address the question of whether Indigenous peoples are arrested more often due to their conspicuous criminality or as a result of police discretion.

Cross-Cultural Education and the Promotion of Mutual Understanding

Some of the works we have reviewed argue that cross-cultural education for law enforcement personnel and Indigenous peoples, as well as public legal education for Indigenous peoples, will lead to greater understanding and result in less discrimination. This, in turn, may reduce Indigenous over-involvement with the criminal justice system.

The most thorough comparison of "Indigenous culture" to "non-Indigenous culture" is that done by J.L.T. James. His conclusions reveal many of the contradictions built into an essentially order/assimilationist analysis which does not recognize the irreconcilable conflict between colonized and colonizer.

> *The criminal justice system exists to preserve the basic values of our culture. If properly understood, those of the native are not basically different. Insofar as the current cultural manifestations of the two value systems appear in conflict, these must be resolved based on the core values underlying both. Instilling selfishness in place of sharing, present and future shock for past and present serenity, and interference for autonomy are not in the best interests of either majority or minority culture. Nor should the cultural gap between non-native workers and native clients prove a gulf if we will attempt to understand the native's culture and respond in ways which show awareness of the differences but, more importantly, of the commonalities in the value systems underlying our cultures.*[18]

James' points about cultural factors are intended to have a general

application to the criminal justice system, but as law enforcement agencies share this interface most directly, we have chosen to discuss them in this context.

Two cultural factors which he feels deserve attention are the communication problem and Native pride. He sees the communication problem as stemming primarily from Indigenous peoples. He describes pride as a sin in non-Indigenous cultures, while he characterizes Indigenous pride as *"a status which brings peace of mind."*[19] His last assumption, that some assimilation plus a sense of identity is part of the solution to the "Native problem," is probably shared by a significant majority of personnel in the criminal justice system.

> *Perhaps it is the fact that the prison represents the ultimate failure to succeed in the dominant society that forces some natives to face the option of becoming successful natives, better able to face with pride the challenge of surviving in today's world. Given that imprisonment serves to confirm in most inmates an identification with the criminal subculture, natives who use this opportunity to identify with their own culture may be the least damaged and, unwittingly the best served by prison systems.*[20]

Other authors have attempted to make a case for cross-cultural education. Hylton[21] gathered data on the prejudices held by Regina's police and public against Indigenous peoples, and documented the over-involvement of Indigenous peoples in the criminal justice system. He then described existing education programs offered by the RCMP Training Depot in Regina and argues that a socio-historical description of the factors contributing to over-involvement be a key component of the curriculum. He further states:

> *while some countries have tried to assimilate minority groups so that there is only one set of values and traditions, in Canada we have traditionally fostered and encouraged ethnic pluralism. This message needs to get across.*[22]

This may be the rhetoric, but it is a long way from the reality of the experience of Indigenous peoples, or the policy of the Canadian state with respect to them. As Ponting and Gibbins suggest, government policy has been designed to assimilate Indigenous peoples and not to encourage ethnic pluralism.

> *The 1966 White Paper was the capstone of a policy of assimilation that can be traced back to the pre-Confederation years. Its rejection by Indians and its formal retraction by the government in 1971 thus marks a watershed in the evolution of Indian affairs in Canada. Assimilation was at least officially placed aside as an explicit policy goal, although it may well go on as a socio-economic and cultural process.*[23]

Hylton also advocates affirmative action programs and a life-long learning approach to multi-cultural education.

> *I can think of no better way to accomplish mutual understanding and respect than to have police officers from many different cultural backgrounds working side by side.*[24]

However, he also notes that multicultural education at the recruitment level can be undone in the field by the prevailing professional ethos. Longitudinal studies of the effect of multicultural education programs constitute a major gap in research literature.

The Indigenization of Policing Assumptions

Some research literature focuses on "indigenization" as a means of making police discretion less biased against Indigenous peoples. The

process of indigenization takes two forms. One consists of the creation of special status police officers within existing police forces, or affirmative hiring practices to attract Indigenous peoples to regular policing; while the second consists of the devolution of law enforcement functions to agencies autonomously controlled and staffed by Indigenous peoples. The assumption inherent in both forms of indigenization is that there will be less discriminatory policing through the more sensitive, culturally-conscious exercise of police discretion. This culturally-conscious exercise of police discretion may reduce the number of Indigenous peoples entering the criminal justice system, thereby lessening their over-involvement within all facets of the system.

We will outline what little has been said about "indigenization" as a strategy. William Hagan (1966)[25] reviewed the function of Indigenous police and judges from an American historical perspective. In the United States indigenization began in the 19th century while it is a relatively late (1974) 20th century phenomenon in Canada. The following quotations suggest that the underlying issues may not, however, be markedly different:

> *...coping with renegades and common criminal elements was the original reason for organizing the Indian police, another use to which they would be put appeared in an early draft to the appropriation bill authorizing them. It provided that they should be employed also 'for the purposes of civilization of the Indians' which eventually was to inspire some of the most interesting, if debatable, duties of the Indian police.*[26]

Hagan describes some of these duties.

> *As an advance agent of the white man's way he frequently found himself opposed by most of his fellow tribesmen, especially the old, respected leaders. Cast as an informer, a petty police spy, he had to report on the work habits of bands to determine whether they merited sugar, coffee, tobacco, and other rations. Such a role would be difficult in any society.*[27]

In a contemporary Canadian evaluation, the authors of the Evalucan study on the RCMP Indian Special Constable Program asked,

> *How much time is allocated to undercover work on reserves in an attempt to clearly identify and be able to prosecute the ringleaders that constitute the negative element within the community.*[28]

Oliver Brass (1979)[29] comments on contemporary negative relationships between what he calls the "police subculture" and the "Indigenous subculture." He reviews the historical and anthropological literature and concludes that Indigenous peoples accept the need for policing and always have.

> *The problem is therefore not a cross-cultural conceptual disagreement but rather one relating to police attitudes and methods.*[30]

Brass' critique of the special constable approach to indigenization (i.e., hiring Indigenous peoples into the RCMP) suggests that special constables are recruited from the "affluent" elements in the band population, not the traditional or poor families, and yet it is mostly these latter groups of Indigenous peoples who are in conflict with the law. He also warns that peer pressure to identify with white fellow officers is likely to occur and thus defeat the purpose of the special constable program. Finally, he argues that the "special" status with

lower pay and entry qualifications will promote a double standard and reinforce cultural relativism and stereotyping.[31]

The Policing of Reserves: A Special Context

It is also important to examine whether or not assumptions about policing in urban areas or in off-reserve rural areas are applicable to on-reserve policing. There is a lack of research literature that addresses this question. Most authors simply assume that policing reserves is the same as policing in other areas.

The Dakota-Ojibway Tribal Council Police Program

Only one publication was available that was both an empirical and conceptual attempt to evaluate the particular features of policing on reserves and indigenization. This was the evaluation of *The Dakota-Ojibway Tribal Council Program*[32] (DOTC) which is an autonomous policing project in Manitoba. The authors, Singer and Moyer, compared the types of offenses committed on reserves with those committed in the rest of Canada. They found that reserves have more assaults, but less property offenses, and that reserve police must deal with many instances of public drunkenness and "disturbance." As with other Canadian communities, in the vast majority of situations offenses on reserves are brought to the attention of the police by residents.

Singer and Moyer found that the balance between an order-maintenance and social service role was different on reserves. They estimate, from American data, that less than one-half of off-reserve policing is order-maintenance while Canadian estimates run as low as

one-quarter. Comparing this to policing on reserves, they conclude that reserve police will have a very significant social service or crisis intervention role. In fact reserve police fulfilled a significant array of broadly-based social service roles while the RCMP were seen as providing traditional law enforcement services.

> *As one DOTC officer put it, the reserve police officer is 'part social worker, taxi driver, alcohol worker, ambulance driver, peace keeper and dog catcher.'*[33]

The evaluation confirms that on the DOTC reserves, as in other rural and urban situations, there was a public demand for accessible policing. In the case of the DOTC this is apparently satisfied by autonomous reserve policing. Since the project exemplifies the model of indigenization presented earlier, Singer and Moyer's comments on the validity of its implicit and explicit assumptions are therefore pertinent.

> *It is possible that, by sharing the same or a similar culture and knowing the disputants personally, the DOTC officers are better able than regular members of the RCMP to deal with conflict situations by finding alternative remedies to maintain order. There is no evidence that the quality of life on the reserves has changed as a result of this practice by the DOTC Police.*[34]

The authors are cautious not only in their comments relating to quality of life but also about the possibility of reduced involvement with the criminal justice system.

> *To summarize the available information on the impact of the DOTC Police on resident involvement in the justice system: there is tentative evidence that there was an overall decrease in the number of band members who have become involved in the justice system since the DOTC Police began.*[35]

The evaluators use incarceration as their index of success. In discussing the overall decrease they state:

> *...it is impossible to attribute this change directly to the DOTC Police because of the many intervening variables which can potentially affect incarceration rates.* [36]

They hypothesize, for example, that fewer charges could have been laid by the RCMP which would have reduced incarceration rates, DOTC Police discretion to mediate rather than prosecute could have reduced conviction rates, or there may have simply been less crime. The reduction of crime could be attributed to the project (the "Hawthorne effect" on the community), to improved social conditions, to the deterrent or preventive effect of on-reserve policing, or to the departure of troublemakers from the reserves.[37]

The DOTC Police evaluation provides a reference point for examining the indigenization of policing as it has developed in the last decade. There is a growing preference in the criminal justice system for informal justice[38] administered by corrections personnel with a human service background. Diversion, mediation, and the alternative measures stressed in the Young Offenders Act are some examples. Research has yet to reveal whether these measures improve the quality of life, are simply cheaper, or widen the net of the criminal justice system to the detriment of the original goal. Assumptions that informal justice will improve the quality of life are implicit in the policies to indigenize policing.

Indigenized Police Services in Canada: History, Program Implementation and Evaluation

The remaining literature relating to law enforcement and Indigenous peoples will be reviewed to highlight the competing views between those favouring autonomous policing and those favouring special constables. It appears that this competition is between Indigenous organizations or groups and the federal government. Most studies done by or for Indigenous organizations approve of autonomous policing while those done by or for government agencies appear to prefer policing by special constables.

Apart from the DOTC Police, we will discuss three other programs concerned with the indigenization of policing: the RCMP Option 3(b) program; the Indian Policing Program of the Ontario Provincial Police; and the Amerindian Police in Quebec. All of these date back to the mid-1970's. The research literature on these programs is not as consistently thorough as Singer and Moyer's study on the DOTC Police. Most of the evaluations of Option 3(b) have very narrow terms of reference with no consideration as to whether or not special constable policing should exist. Instead emphasis is placed on how Option 3(b) can be improved, without considering other policing methods.

Policing on Reserves: Report of the Task Force

The one study that does have wider terms of reference was a 1973 evaluation entitled *Report of the Task Force: Policing on Reserves.*[39] The mandate to indigenize policing was not provided by members of this federal task force. Rather, they identified a range of problems in

policing Indigenous communities.

> *Indian communities on reserves have a right to expect as good policing as other Canadian communities. For a variety of reasons, some of which stem from the isolated and remote nature of some reserves, policing has been less than adequate, and one of several consequences has been the disproportionately high incidence of petty crime among the inhabitants.*[40]

The *Task Force* model differs in one respect from ours in that it does not see policing as criminogenic. Instead the study subscribed to a policing-prevents-crime-by-deterrence model and in turn advocated the following recommendations:

> *Expansion and improvement of the Indian constable system through:*
>
> *a) Clear definition of terms of reference, including expanded authority under federal and provincial legislation;*
>
> *b) Training of band constables to provide knowledge of modern police methods and skills;*
>
> *c) Adequate and standardized pay levels and working conditions to recognize the importance of this as a career position;*
>
> *d) Continuing supervision by the appropriate police force.*
>
> *...That, where feasible, the Royal Canadian Mounted Police be requested to take responsibility for training and supervision of the Indian constable system.*[41]

Some assumptions explicitly made by the *Task Force* report were:

> *4) Any minority group should, where appropriate, be policed within the local police structure by members of its own community;*
>
> *5) Indians should be offered the choice as to the type of police service they prefer; and*
>
> *6) There is a need for preventive policing which could be obtained by a police presence on reserves, and at the same time improve upon the complaint-oriented system which now prevails.*[42]

The report was concerned with clarifying jurisdictional responsibility by terminating the multiple police jurisdiction on Indian reserves, and through federal/provincial arrangements

> *...to remove confusion in the minds of the people and to avoid costly and inefficient use of police manpower. A single force on each reserve is recommended, assisted by an expanded and improved Indian constabulary.*[43]

The *Task Force* explored three options or alternative methods of providing for policing on reserves. Two of these options involve indigenization while the third proposes municipal policing. Municipal policing involves the purchase of police services from existing forces. Reserve police would, therefore, be obtained from either the RCMP or the provincial police force.

The options to indigenize policing are 3(a) and 3(b). Option 3(a) suggests an autonomous Indian police force as advocated by Indian associations in New Brunswick and Saskatchewan. The task force was not, however, persuaded of the merits of option 3(a). Members cited provincial reluctance to set up a completely separate force, the objections of Indigenous peoples themselves, and the substantial amount of federal funding required against this option. There were two principal problems supposedly preventing the utilization of option 3(a). First, there was

> *...the present lack of police experience among Indians to administer and operate such a force. [Secondly,] assuming that such a force was being considered, the problem of recruiting to the required standard would present difficulties.* [44]

Option 3(b) proposes that Native Special Constables work within an Indian branch or contingent of an existing police force. The task force saw the advantages of 3(b) as career development and the guarantee

of adequate training, salaries, and pension benefits. It was further argued that within the structure of competent and well organized police forces Native constables could provide a high standard of policing on reserves.[45] The task force's cross-country consultative process showed that preference for option 3(b) was widely shared. It was the obvious choice of the task force as well, although there is a tendency to downplay their preference for obtion 3(b) in some parts of the report. They also recommended that bands be given freedom to choose the type of policing they wanted, provided their decision was acceptable to the provincial Attorney General. It should be noted that this is hardly self-determination.

Task Force on Policing in Ontario

In 1974 when the RCMP withdrew detachments from Ontario reserves because of the serious problems involved in multi-jurisdictional policing, band councils were faced with establishing a band constable system. The Hodges' *Task Force on Policing in Ontario*[46] was appointed to review the situation and recommended:

> *the primary responsibility for policing Indian communities in the Province of Ontario should rest with the OPP or other operating force within whose area a reserve lies.*[47]

A second part of this recommendation urged that band constables be retained to enforce by-laws and other laws *"under the supervision of a regular force, for which purposes special constable status will be conferred."*[48]

Evaluation of the Indian Policing Program

Because there are no other data we are confined solely to the Harris *Evaluation of the Indian Policing Program* (1977)[49] to identify the outcome of choosing Option 3(b) in Ontario. Following is their summary of findings:

> *Since the start of the program, it is easier to obtain the services of the police; there is a change in attitude towards lawlessness, and more people are making use of the police service; the police presence is more visible; and there is an increasing demand for police service even for minor offences. This is reflected by an increase in reported crime even though the people were divided as to whether there is more or less crime. In most cases people are happy with the Special Constable system (in fact they want to see more Special Constables). In addition the Special Constables see a high degree of job satisfaction; there is adequate training, salaries and benefits and a sizeable percentage plan to stay within the system. For these reasons it must be concluded that although there is a great deal more crime prevention/community service work which can be done (and there is a demand for it) that the Indian Policing Program is effective.*[50]

Harris found a significant increase in reported crime which he describes as "dramatic." Yet the report makes the point that the community was almost evenly divided about whether or not there had actually been more crime after the inception of the Indian Policing Program.

> *One might conclude here that there is actually no change in the amount of actual crime even though the amount of reported crime has increased.*[51]

The "dramatic" increase in reported crime indicated that the placing of Special Constables on Ontario reserves did, in fact, increase the involvement of Indigenous peoples with the criminal justice system. Community members, however, seemed pleased because policing was more accessible.

Harris' conclusions about the amount of actual crime differ from

Singer and Moyer's, but both are cautious about their results. Harris attempted to measure actual crime by using reported crime statistics while Singer and Moyer used incarceration rates for their measurements.

Evaluation of the RCMP Indian Special Constable Program (Option 3(b))

In 1978 Evalucan Ltd., a private research firm, evaluated the implementation of option 3(b) in Western Canada for the Department of Indian Affairs and Northern Development.[52] The report was very positive about the Native Special Constable Program, although it did not ask if 3(b) policing should exist or if any major changes were necessary. The study was primarily concerned with attitudes towards, or perceptions of, the Native Special Constables. A questionnaire was administered to all Native Special Constables in the field as of September 30, 1977; to a 25% sample of the detachment area with an emphasis on reserve-based people, particularly chiefs; and to RCMP detachments with Native Special Constables, preferably the special constable field trainer. The evaluation team met with Indian associations in Manitoba, Saskatchewan, Alberta and British Columbia; with the provincial Attorney Generals; and with RCMP division headquarters. Very few people affected by police actions were surveyed.

The study found that RCMP Native Special Constables were seen as more effective than band constables by both the RCMP and Indigenous communities. Indigenous leaders indicated that policing by special constables was good, but complained that there were not enough special constables to meet community needs. The evaluation confirmed Brass'

view (1979) that special constables were recruited from the upper socio-economic and education levels of reserve populations. The report did not question this situation; for example, the researchers never considered why these persons were recruited and why others were.

Native People in the Administration of Justice in the Provincial Courts of Alberta

Between 1973 and 1978 a review of the administration of justice in the provincial courts of Alberta was conducted under the chairmanship of Mr. Justice W.J.C. Kirby.[53] The review board found policing in Alberta reserves by inexperienced regular RCMP was a source of many grievances. On the other hand, the report described instances of friendly relationships between reserve residents and nearby RCMP detachments. These instances were thought to be a result of officers who *"participate in recreational and other activities on the reserve."*[54]

The report was strongly supportive of the cross-cultural educational program offered by the Depot Division of the RCMP. It was also enthusiastic about the liaison model developed by the RCMP in British Columbia through a Native policing co-ordinator. The co-ordinator is an RCMP officer working with Indigenous peoples in order to develop educational programs and monitor community/police relations.

Kirby also reviewed the quality of joint RCMP and band council supervision of band policing. This joint supervision arrangement was found to be unsatisfactory, as were many other features. Some problems associated with band policing were the limited jurisdiction of band constables, the policy not to expose them to danger or allow them to

carry sidearms, lack of respect from band leaders, poor training, poor salaries, and politicization and personalization of their exercise of discretion. Kirby did not recommend extension of this type of band constable policing. Instead, he recommended the creation of band police commissions for existing forces to provide checks and balances on band councils and more extensive training for the band constables.

The review board was very enthusiastic about special constables working in the RCMP.

> *The Option 3b Program has great potential for improving the administration of justice with respect to Indians. Not only does it afford an opportunity for Indians to assume greater responsibility in law enforcement on reserves, it can also be the means of solving the problem of communications between Indians and the R.C.M.P. The Special Constable, because he lives on the reserve, can communicate with the residents in their Native language, shares their customs and culture, and is sensitive to their problems. This program can serve to bring about greater confidence on the part of Indians in the administration of justice.*[55]

The Kirby review clearly subscribes to the assumptions that indigenization will result in discretion being positively biased towards Indigenous peoples. However, it does not address the fact, as other authors have pointed out, that Native special constables come from the more affluent, better educated sector of reserve residents; nor does it ask how this affects special constable policing. The review does not measure the impact of option 3(b) quantitatively or qualitatively and, therefore, is unable to say whether or not this option reduces the involvement of Indigenous peoples with the criminal justice system.

Alberta's RCMP as well as the Calgary and Edmonton City Police

quickly adopted some of Kirby's recommendations and hired Native policing co-ordinators. Certain bands also established band police commissions to oversee their band constables. We have not seen evaluations of these programs and thus cannot comment on their results.

Policing on Reserves: A Review of Current Programs and Alternatives

The Native Counselling Services of Alberta (NCSA) completed the most comprehensive review of the options for indigenizing law enforcement. While they have not done an empirical study their conceptual framework looks at community involvement and control and is much more congruent with our own perspective.

> *It should be realized from the outset that in reviewing various forms of on-reserve policing there is no one correct method or structure. There are so many insoluble fundamental conflicts of interest that only through careful compromise can any solutions be found.* 56

The study subscribes to the view that cross cultural understanding can even allow non-Indigenous police to transcend their race. It cites the example of non-Indigenous band constables who command the respect of the reserve community and proposes that policing issues have lesser significance if social problems are dealt with by methods other than the criminal justice system. For example, the authors feel that increased recreational diversion may lessen criminal justice involvement more effectively than the positive exercising of discretion by police.

The study concludes that the most difficult contradiction to reconcile is that between "local" and "unbiased" policing. While RCMP constables are perceived as strangers, locals are subject to considerable family, clan, and community political pressures. The conclusions of this

report are in stark contrast to those of the Kirby review. NCSA are extremely critical of the review board for recommending that option 3(b) be given full government support without considering objections from Indigenous communities.

The Native Counselling Services of Alberta study raises a number of problems about the operation of option 3(b) including: split funding between jurisdictions; inadequate time spent on reserves by special constables; conflicts of identity for special constables; and ostracism resulting in the desire to live off the reserve. Recruitment problems such as the delay involved in letting applicants know if they have been accepted and poor liaison between RCMP detachments and reserves were other concerns.

> *In Alberta, Option 3b cannot now be regarded as a viable program for most reserves. Although it was conceptually solid and there was potential for its constructive development, the program has become politically defunct. The current trend is clearly towards autonomous Indian policing.*[57]

It is significant that in recent years research literature has been emerging on autonomous policing; for example, Singer and Moyer (1981) and the Native Counselling Services of Alberta (1980), rather than on the RCMP Native Special Constable Program. The autonomous policing literature may reveal a disenchantment with option 3(b) which emerges when independent researchers allow Indigenous peoples to express their real concerns.

Amerindian Police

Quebec followed the autonomous policing route along the lines of option 3(a) and a separate Indigenous police force—the Amerindian Police Service—was established.[58] Option 3(a) may have emerged as viable in Quebec because band-provincial government relations have been so strained that Native special constables integrated into the Quebec Provincial Police would not have been acceptable to Indigenous peoples. Informal questioning by the reviewers leads us to the view that even under option 3(a) there has been considerable tension between the Amerindian Police Commission and the Quebec Police Commission over control and jurisdiction. Regrettably, we have found no research studies on this experiment.

Conclusions

It is evident that option 3(a) requires a much more stringent and independent evaluation, both in terms of community satisfaction with this approach and in terms of its actual impact on the over-involvement of Indigenous peoples with the criminal justice system.

A detailed analysis of autonomous policing, such as the DOTC program, the Amerindian Police, and numerous band constable programs is also required to determine their strengths, weaknesses, successes, and failures. Such research needs to ensure authentic Indigenous input in the design stage.

The research literature which we were able to gain access to is devoid of any material on alternative methods of law enforcement for the

significant number of Indigenous peoples who have migrated to the city. This area will probably become more pressing as shown by the 1983 Review of the Regina Police Service Canine Unit.[59]

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CHAPTER 3: INDIGENOUS PEOPLES IN THE CRIMINAL COURT PROCESS

Introduction

This chapter reviews the literature concerning Indigenous peoples in the Canadian criminal court process, and court-related services for Indigenous peoples. Legal aid services, prosecutorial agencies, Native Courtworker Services, the indigenization of courts and lawyers, and tribal courts are examined, and some implicit conceptual models used in this literature are identified. Emphasis is on the process of the court itself rather than the outcomes of court actions. An examination of dispositions (sentencing) of Indigenous offenders has been deferred to the next chapter.

One assumption put forward to explain the over-involvement of Indigenous peoples with the criminal justice system is negative police bias resulting in excessive charges laid against Indigenous peoples. Once involved with the court process, however, an offender's experience is influenced by other factors. For example, in the literature reviewed the inadequacy, both qualitatively and quantitatively, of legal representation is a major concern. In addition, Indigenous peoples are mystified by the legal language of the courts and as a result do not understand legal proceedings. The process thus is more conducive to quilty rather than not guilty pleas. Another concern identified as a cause of extremely inequitable treatment of Indigenous peoples in court is judicial bias and the wide discretion permitted judges which often leads to the choice of custodial rather than community-based sentencing options.

Problem Definition and Solution Model

The literature reviewed sees an improvement in legal services for Indigenous peoples as the partial solution to the problems identified above. Most of the authors reviewed believe this improvement will be the result of increasing the number of Indigenous lawyers and providing Native courtworkers and interpreters. As well, the solution to judicial bias is seen in the establishment of Indigenous ajudicatory institutions which can involve Indigenous adjudicators in regular courts, Indigenous justices of the peace, and the establishment of tribal courts. Public legal education programs to demystify legal processes for Indigenous people is a further part of this model for conceptualizing and solving the problem of bias in the criminal court process.

Legal Representation

Bradford Morse's critique of legal services for Indigenous peoples will be reviewed first because it provides a useful contextual overview of these services in Canada. In "Native People and Legal Services in Canada" (1976)[1] Morse proposes that deficiencies in the legal representation of Indigenous peoples result from the universal integration of legal services into provincial legal aid schemes. Because of language and cultural barriers few Indigenous peoples use legal aid services. As well, there is a lack of legal services and lawyers in rural areas where most Indigenous peoples live. Morse identifies a need for autonomous Indigenous control of legal services.

> *Gaining access is one problem, control is another: 'Paternalism has been the dominant characteristic of delivery of services to Native People in Canada. History has not indicated that this approach is successful in terms of preserving or facilitating self-determination on the part of Native People. Paternalism fosters dependency relationships and thereby destroys any real equality of bargaining power between Indian people and the government. Native Peoples must move from being merely* recipients *of social services to being* participants *in the delivery process, and ultimately to being the sole distributors and administrators of these social services.' This transformation from passive recipient to active participant is impeded in part by the present legal services framework and the lack of awareness on the part of the legal profession.*[2]

According to Morse, problems of inaccessibility, under-utilization, lack of outreach and preventive educational programs, lack of legal expertise, and language and cultural barriers could be alleviated by adequately funded autonomous legal services.

During the mid-1970's when he was reviewing the state of legal service programs for Indigenous peoples there was only one such program. It was located in Frobisher Bay, N.W.T. Morse predicted that outside agencies such as the Department of Justice or provincial legal aid programs would initiate setting up legal services for Indigenous peoples, but warned that:

> *this obviously has its hazards. The outside agency can choose to parachute into the Native community and simply open an office. This route is not to be recommended, although it has been occasionally successful. It can create a climate of antagonism and minimize the possiblity of community control. Alternatively, the agency can perceive its own role as that of a resource person who provides necessary expertise to the decision-maker. The local Native community should initially be granted an assurance of adequate funding to overcome their properly held scepticism.*

> *The range of options in legal services programmes should be clearly delineated to the native leadership. The method of implementation and its pace should be determined by the local Native community, if they are really to control the project and view it as their own. This does not mean that the agency should refrain from offering any assistance. On the contrary, it should inform the community that it is ready, willing, and able to provide its expertise on a consultative basis as requested by the Native People.*[3]

Morse advocates community organizing as against test case litigation, the balancing of individual case-handling against long-term projects, and a continuous process of client- and community-education. This model envisages that the non-Indigenous staff lawyer will ultimately leave legal services in the control of the local community.

He draws a sharp distinction between what he sees as the disorganized and dispirited urban poor and more homogeneous, collectively oriented rural residents:

> *It should be recognized that the problem encountered by lawyers involved in legal services in the poor urban communities are not entirely transferable to the Native community. Since Native People primarily reside in rural or remote areas, the specific tensions engendered by the urban environment do not exist. The Native community is not as disorganized and dispirited as are the urban poor. Credible indigenous leadership that has been elected exists in almost all native communities. These leaders have some level of administrative sophistication due to their contact with the Department of Indian Affairs and Northern Development and their previous experiences in operating programmes. A sense of homogeneity exists in Native communities, particularly on reserves, that is unequalled in any urban centre. This has been produced by the sharing of a common culture, tradition and philosophy. Poverty and discrimination bind Native People closely together.*[4]

Morse does not "blame the victim," rather he suggests that a strong, homogeneous Indigenous community can improve its own conditions.

However, his analysis may be overly optimistic about the impact that law can have on the lives of Indigenous peoples. From a conflict perspective, changing or improving only legal services for Indigenous peoples will have a limited effect on their lives because the economic and political relationships between the colonized and the colonizer are not basically altered.

There are two other available studies on legal services to Indigenous peoples: Havemann's evaluation of the Regina Native Counsel Project[5] which offered an urban, group-oriented service; and Frewin and Maunula's evaluation of the Thunder Bay District Native Legal Counselling Service[6] which had a rural-outreach, individual emphasis.

Regina Native Counsel Project

The purpose of the Regina Native Counsel Project was to offer legal services to Indigenous groups or organizations in an urban setting. For a number of reasons, however, this objective was not met. The Project demonstrated that in urban centres Indigenous peoples require substantial individual legal representation and the project was, therefore, primarily involved in individual case-handling in the criminal and juvenile courts. As well, the groups and organizations it was developed to serve used it primarily as a referral service for individuals. This mismatch of objectives defeated much of the intent of the project which misconceived the needs of the people it was intended to serve. Attempts to meet its other objectives of agency education, law reform, and community development were of limited success. One of the

major problems was that there was no secure funding base from any level of government and, as often happens in such cases, neither the federal nor provincial governments would agree to accept long-term financial responsibility. Another major problem was that the project was parachuted into Regina's Indigenous communities and there was no Indigenous control or involvement in its formation. As a result, the Indigenous community never felt a sense of ownership in the project. Hiring problems showed the lack of lawyers willing and/or able to serve Indigenous peoples as a group; however, the community legal worker, a man of Indian ancestry, had some successes with individual cases. His role was similar to that of a courtworker and proved invaluable in speaking to sentence and assisting families and their children in juvenile court. Nevertheless, the project probably succeeded in reducing a number of sentences from custodial to community care, and facilitated some Indigenous community groups in activities which may have prevented juvenile involvement with the criminal justice system.

Thunder Bay District Legal Counselling Services

Frewin and Maunula's evaluation of the Thunder Bay District Legal Counselling Service illustrates many of the same problems as the Native Counsel Project but there are some major differences. First, the "Clinic," as it came to be known, was designed to be an outreach legal service meeting needs of Indian and Metis communities in an area of 20,000 square miles around Thunder Bay.

> '[*Its*] *purpose...*[*was*] *to provide legal advice and assistance to residents of the District of Thunder*

> *Bay in the province of Ontario, particularly Native persons...who, because of language differences, geographical isolation or poverty, do not have ready access to traditional existing legal services.'*[7]

The rural delivery model is similar to a wheel with a staff lawyer (the hub) based in Thunder Bay providing advice, support, and representation for clients served by local legal workers (the spokes) in four communities. Areas of primary focus for the Clinic were: advocacy; mediation and negotiation; community education; community development; and law reform, primarily in the context of individual case-handling.

A distinguishing aspect of the Clinic was the extensive involvement of Indigenous peoples in its initiation, design and management. Indigenous peoples in the communities where legal workers were to be placed were consulted from the beginning. The Ontario Native Council on Justice (ONCJ) can be credited with initiating and sponsoring the idea and two Friendship Centres had representatives involved in the planning process. Other organizations which played an active part were the Ontario Native Women's Association, the Union of Ontario Indians, Grand Council Treaty #9, and the Ontario Metis and Non-Status Indian Association.

However, the Clinic's operation was marred by a poor relationship with the Native courtworkers in the Thunder Bay district. It appears that inadequate liaison with them from the outset resulted in the Clinic being seen as more of a threat than an ally to the courtworkers whose funding base was also inadequate.

A board was formed representing both Indigenous peoples in the communities served and the Ontario Native Council on Justice. Initially

the Clinic was to have been overseen by the Ontario Legal Aid Plan and the ONCJ, but evaluators observed the declining participation of the ONCJ and the board relating much more directly to the Ontario Legal Aid Plan and the staff.

The Clinic faced a number of problems which, the evaluators argued, reduced both its effectiveness and efficiency. These included poor administration and management, inadequate training, high turnover of board members with resulting inexperience, low salary for the lawyer, chronic poor relations with the courtworker program, and infidelity to the original objectives. The evaluators concluded, *"for all these reasons, the original objectives of community education, community development and law reform have disappeared."*[8] Given the special needs of those it served, it was these specific goals which were regarded by the evaluators as perhaps the most important.

After studying the diverse, yet often similar, experiences of the Regina Native Counsel Project and the Thunder Bay District Native Counselling Service, it is evident that an appropriate plan to provide legal representation to Indigenous peoples has yet to be designed and implemented successfully. If, for example, community development is the objective of an organization, as it was for the Regina Native Counsel Project and the Thunder Bay District Native Counselling Service, then a community development action agency should be established rather than a legal counselling service.

Indigenous Lawyers

The inadequacy of legal representation for Indigenous peoples is a major concern in the literature reviewed. One of the proposed solutions is to make Indigenous legal counsel available for Indigenous peoples. To this end an affirmative, eight-week, pre-law, Native Law Student Program, sponsored and overseen by the Native Law Centre at the University of Saskatchewan, has been run annually since 1974. The purpose of the program is to help Indigenous peoples who wish to enter law school but do not have the necessary academic qualifications. Its operation has been evaluated for the Department of Justice by Hope MacLean.[9]

In addressing the underlying assumptions behind such compensatory education for the socially and educationally disadvantaged, MacLean discovered a consensus in the literature that *"there was no scientific evidence that compensatory education programs were effective."*[10] She also examined the problem-definition/solution model which formed the basis for the Native Law Student Program. The problem was defined as a scarcity of Indigenous lawyers and it was felt that culturally biased entrance examinations such as Law School Admission Tests (LSAT) were partially responsible for this. The Native Law Student Program was seen as a partial solution, assuming it would enable more Indigenous peoples to become lawyers.

> *Many of the interests and problems of Native people in Canada were legal. For example, a disproportionate number of Native people were in conflict with the law; it was felt that non-Native lawyers often communicated poorly with their Native clients, and so did not give*

> *them the best possible service. So too, there was a growing interest in aboriginal rights, and at the same time, an increased desire among Native people to manage their own affairs, including such important issues as aboriginal rights. Therefore, it was felt that there should be more Native lawyers who might be particularly interested in and suited to serving the Native community.*[11]

These were the major factors leading the University of Saskatchewan Law School to initiate the program.

This rationale for the program is congruent with the model which sees indigenization of representation as a means of lessening Indigenous over-involvement with the criminal justice system. As stated by MacLean, it was felt that non-Indigenous lawyers often communicated poorly with Indigenous clients and thus Indigenous lawyers might be better able to serve Indigenous defendants. Other authors[12] have also argued that Indigenous defendants often plead guilty because they do not understand or are discomforted by the court process. Indigenous lawyers might, therefore, lessen the number of Indigenous peoples serving prison sentences. In addition, it was proposed that Indigenous lawyers may be better suited to serving Indigenous communities in such important issues as aboriginal rights. MacLean does not link the idea of Indigenous lawyers fighting for aboriginal rights with the proposition that this may directly lessen Indigenous involvement with the criminal justice system. However, if through gains in aboriginal rights Indigenous communities are able to develop economically and counteract some of the negative effects of the "development of underdevelopment," then we would argue that Indigenous peoples' over-

involvement with the criminal justice system would decline.

MacLean's evaluation concluded that the major benefits of the program lay primarily in the social as opposed to the educational or academic realm. For example, Indigenous peoples are encouraged to apply for law school and law school admissions committees have been given the flexibility to admit less formally qualified students. On the other hand, the evaluation was very critical of some aspects of the program. Because of the 54% failure rate among first-year Native law students who graduated from the Native Law Students Program, MacLean argues that the program is not sufficiently screening or preparing students. Indeed, she recommended that if there was no change in format and intent federal funding should be discontinued. She also recommended that students be required either to take more years of post-secondary education before law school, more years of law school, or a special preparatory and remedial year. MacLean concludes that these proposals provide only a partial answer to the concerns which led to the initiation of the program. Finally, she points out that there is no guarantee that Indigenous lawyers will work for Indigenous peoples. The evaluation argued, however, that Indigenous peoples' success in any branch of the legal profession has a major symbolic value for their self-esteem.

Native Courtworkers and Demystification of the Criminal Court Process

The following comment illustrates assumptions about the nature of the problem for which Native courtworkers are seen as a partial solution:

> *Native Courtworkers are recent additions to the Criminal Justice system. They emerged as a response to the injustices that frequently occurred when Native People became involved with the legal system. These injustices were seldom based on racial discrimination by Criminal Justice system personnel, rather they were a result of a lack of knowledge. Native People seldom had knowledge of the law, the terminology and procedures of the court, agencies from which they could get assistance, how to obtain lawyers, their rights, their responsibilities in the process, or the kind of information needed by the court to carry out fair sentencing. Criminal Justice personnel seldom had knowledge of Native lifestyle, culture, the motivation behind the behavior exhibited by Native People, the language difficulties they faced, or the consequences of inappropriate sentencing on Native People, such as the special hardships they faced in trying to pay fines or obeying inappropriate probation orders.*[13]

Marianne Nielson of the Native Counselling Services of Alberta (NCSA) provides a useful exposition of the assumptions underlying the purpose of the Native courtworker programs developed in Canada. She sees the need for courtworkers arising, not out of discriminatory action in the criminal justice system, but from difficulties resulting from the gap between Native culture and non-Native culture, as well as between the "poverty" class and the middle class.

To illustrate these differences, Nielson presents a matrix contrasting European attitudes to punishment with Indigenous peoples' attitudes to punishment. Her classification is derived from statements by Native courtworkers who feel that Indigenous peoples who become

involved in the Canadian criminal justice system lack an understanding of the system and are therefore confused and alienated by it. "Justice" among Indigenous peoples is defined as an integral part of the group's functioning and is commonly understood, while in European culture it is a separate institution only completely understood by specialists. Her thesis is that these value structures are antithetical to one another and susceptible to conflict.

The article then attempts to explain the potential of Native courtworkers within the criminal justice system.

> *The primary function of courtworkers is to act as a bridge between the legal system and Native offenders. This is done mainly by supplying information to both groups, along with a number of other essential services.*[14]

The courtworker is presented as a demystifier for the client and a cross-cultural educator for non-Indigenous personnel working in the criminal justice system.

The major recommendations of the study are to supply more Native courtworkers and to significantly indigenize all facets of the criminal justice system. For example, Nielson proposes that *"Native staff should be hired in proportion to the number of Native clients handled by the program."*[15] She does not propose autonomous indigenization, nor does she appear to recognize that having Indigenous people work within already existing legal institutions will not result in their ultimately having control over their own treatment within these institutions. On the other hand, her article does outline how courtworkers view their roles and how many of the authors reviewed see indigenization. Nielson's

work, therefore, provides a useful comparison for the other reviews and empirical investigations of Native courtworker programs that we have located.

A perceptive historical review produced by the Saskatchewan Native Courtworker Services contains a description of the problems which prompted the development of the courtworker program. "Native Courtworker Services: An Overview"[16] employs a similar problem-definition model to the NCSA's review and is largely derived from the *Indians and the Law* study of 1967. In the Saskatchewan overview the rise of Native courtworker services in Winnipeg and Edmonton in the 1960's is referred to, along with a description of the connections between courtworkers and the John Howard and Elizabeth Fry Societies. As well, it examines the interdepartmental scramble between the federal departments of Indian Affairs and Northern Development, Manpower, National Health and Welfare, and Justice to find funding for the program. By the mid 1970's it seems that the Department of Justice was to have financial responsibility. This study, for all its perceptiveness, almost totally fails to acknowledge the involvement of friendship centres. By disregarding the potential role of the centres as carriers of services offered to Indigenous peoples by Indigenous peoples, an important aspect of policy formation was ignored. Furthermore, research into the role that friendship centres can play should be encouraged. Preferably this would not be solely a program evaluation but rather a field survey which examined the perceptions of the users of the services offered by friendship centres.

The Saskatchewan overview, however, raises an important point that is seldom voiced elsewhere.

> *...while problems might originate throughout the system, the courts were at the point where workers could initially bring pressure to bear.*
>
> *The corollary to this may be that, while the courts may be the easiest point to enter, they may not be the most effective point to bring about change. The complaint sometimes voiced that courtwork is 'band-aid' work may reflect this fact. This is a question which could be explored in an assessment.*[17]

Unfortunately, no suggestion is made as to how this essentially ideological question could be addressed.

Review of the Ontario Native Courtworker Program

In 1980 Stan Jolly, ONCJ co-ordinator, and Roger Obonsawin, executive director of the Native Canadian Centre of Toronto, conducted a *Review of the Ontario Native Courtworker Program.*[18] The review, prepared for ONCJ and the Ontario Federation of Indian Friendship Centres, examined the role of Native courtworkers; and their training and management. This was done chiefly by interviewing courtworkers, ex-courtworkers, executive directors, judges, parole and probation officers, crown attorneys, aftercare officers, duty and defence council, and a number of courtworker clients. Clearly, the review falls into the traditional problem-definition/solution pattern of defining Indigenous peoples' over-involvement in the criminal justice system as the "problem," and simply lessening or mitigating the impact of this over-involvement as the solution. The evaluators, however, are alert to broad socio-economic issues and their impact on Indigenous peoples. For

example, they recognize how the fiscal crisis resulting in "tight money"; urbanization and family dysfunction; the energy crunch; civil, administrative and family law matters; Indian Act revisions; and the Young Offenders Act will adversely affect Indigenous peoples and increase their demand for assistance with the court process.

Jolly and Obonsawin argued that the Ontario Courtworker Program should more clearly define its aims and objectives and recommended that these be:

> 1. *To ensure access for all Native Citizens in Ontario to the best available legal and justice-related services prior to, during and following a court appearance and to monitor the effectiveness of these services....*
> 2. *To reduce the sense of alienation experienced by status and non-status Indians and Metis who are in conflict with the law and to bridge the cultural and linguistic gap between Native people and the justice system....*
> 3. *To diminish the number of Native people who are charged with offenses and processed through the justice system.*[19]

As well as speaking to sentence, the last of these recommendations included the development of a variety of reconciliatory, reparative and preventive programs for native youth.

Obonsawin and Jolly advocated a more de-centralized, regionalized delivery system and management structure for the courtworker program because courtworkers play different roles in different areas.

> *For instance, while 100% of those interviewed in the Parry Sound area saw the courtworker fulfilling an advocate/ombudsman role, only 14.3% did so in the Cochrane-Moosonee area. While 81.5% of those interviewed in the Toronto area described the courtworker as a social counsellor, only 22.7% of those interviewed*

> *in the Sault Ste. Marie area described their role in this way.*[20]

They also found considerable differences in the needs perceived by various communities. As well, those interviewed had different sets of priorities for services they felt were important.

> *In the Stage Four research, it is clear that people in different areas see their needs quite differently. For example, 76.9% of those interviewed in the Fort Frances area identified a need for representation on summary conviction matters in the criminal courts but only 28.6% saw this as a need in London and Sudbury. Also, 95.5% of those interviewed in the Kenora area cited a need for family courtwork; however, only 37.5% of those interviewed in the Rama Reserve area indicated a need for this service. Even within a region people see their needs differently. For instance, 92.3% of those interviewed in the Fort Frances area recognized a need for assistance with civil and administrative legal services but only 15.4% in Red Lake did so.*[21]

The Ontario review nevertheless concluded that friendship centres in urban areas should remain the base for courtworkers as they are designed to meet the needs of hinterland migrants entering the urban system.

The review was alert to special issues on reserves and in rural areas where the criminal justice system *"seems to be bearing down rather forcefully."*[22] The authors therefore investigated the quality of courtworker services administered by band councils. Absence of role definition, inaccessibility, and political factionalism were found to produce confusion as well as widespread dissatisfaction with the quality of this branch of the courtworker service. Despite these impediments the review concluded that the use of the band council as an organizational base for the delivery system on reserves should not be discontinued but *"rather, we feel that they point to the need for special,*

intensive, innovative efforts to upgrade such services on reserves."[23] The interviewees made numerous suggestions about ways of improving or augmenting the range of services offered by courtworkers. Expansion of courtworkers into the family courts emerged as an almost unanimous demand.[24]

Problems associated with Native courtworker services resemble those of Native policing. In particular, the band council role in the management of services emerges as a constant theme of dissatisfaction. Obonsawin and Jolly conclude their report by advocating a radical change of program management.

> *We believe that the Ontario Native Courtworker Program must undergo significant change in order to be more effective in meeting the needs of Native people in Ontario. To achieve the necessary changes, there must be co-operation, understanding and increased financial support from government. A transfusion of money into the courtworker program, however, is not, in itself, sufficient. It must be matched by long-range vision on the part of the Ontario Federation of Indian Friendship Centres. In particular, it is essential to the future development of the courtworker program that the Federation courageously commit itself to a thorough overhaul of the management of the courtworker program. A cosmetic facelift for the old management structure will not be enough to fulfill the challenging role which this vital service must play for the Native community during the 1980's.*[25]

They suggest the creation of a commission to make all policy decisions on operational procedures, standards, and guidelines for service delivery. This commission would also negotiate with the federal and provincial governments for funding as well as negotiate the contracts with each carrier agency, i.e., friendship centre or band council. The commission would provide a secretariat to what would become known as the

Ontario Native Counselling Service, and the executive officers of the commission would have a central role in training courtworkers.

Criminal Courtworker, Native Counselling Services of Alberta: A Program Review and Evaluation Assessment

Co-West Associates conducted A *Program Review and Evaluation Assessment*[26] (the Kupfer Report) of the criminal courtworker program of the Native Counselling Services of Alberta (NCSA). This was an independent study for the federal Department of Justice and the Alberta Department of the Solicitor General. Like the Ontario review, it collected data on the perceptions of the Native Courtworker service held by courtworkers, other criminal justice personnel, and related groups. The authors took their review process one stage further than Ontario and put forward an evaluation model which has not been operationalized.

Their assessment describes the history, organizational policy, and objectives of the criminal courtworker program of the Native Counselling Service of Alberta. NCSA's primary objective is *"to gain fair and equitable treatment for Native people involved with the Legal system."*[27] The following vehicles have been identified for the realization of the primary objective: (1) cross-cultural and public legal education; (2) prevention; (3) assistance; and (4) rehabilitation. Hence, it seems that their underlying problem-definition/solution model is that cross-cultural and public legal education, combined with some indigenization of the criminal justice system, will diminish the involvement of Indigenous people with the criminal justice system.

The Co-West review found that courtworkers exhibited conflicting perceptions of their roles. Since they viewed their jobs as more than simply helping Indigenous peoples who became entangled in the criminal court process, this led to some confusion about what their priorities should be. Like the authors of the Ontario review, a summary of the courtworker perceptions led the Co-West authors:

> *...to believe that within the diversity of secondary themes lies varying degrees of confusion for the workers as to how to priorize their daily business. Certainly such an array of purposes may well add considerable stress and/or lack of clarity, as the workers seek to provide a service that is both productive and satisfying to all the actors who interface with the Courtworker in the judicial system: accused, criminal justice personnel, community agencies, and the Native and white community at large.*[28]

Even with this role confusion, Native courtworkers in Alberta felt the program was effective, as the following responses indicate:

> *Lowering of incarceration because people have options besides pleading guilty. Judges become aware of options other than jail.*
>
> *White people become more sensitized to Native culture and vice versa.*
>
> *The Criminal Courtworker Program enables people to go through quickly and with less stress, feeling supported and less fearful.*
>
> *The Program has helped to deter others; 'moccasin telegraph' is very effective.*
>
> *We've been able to help the accused in court: he's got lot's [sic] he wants to say, but he gets so nervous and shy he ends up saying nothing. It makes a difference in the sentencing.*
>
> *What this Program gives a Native is confidence. He's not pleading guilty to something he doesn't understand. I knew the system before Native Counselling and after. If this Program had been in effect earlier, there wouldn't have been so many Natives in jail.*

> *At one time a Native used to sign a statement without even knowing what it said; this has changed.*
>
> *Native people are beginning to speak up for themselves in court rather than just pleading guilty.*
>
> *In effect, we say to Native people, 'You can present your story and if you need help, I'm there.'*
>
> *At least now Natives have access to lawyers and we can talk to the prosecutor, judge, lawyer, and the P.O. for them. Judge and R.C.M.P. used to be LAW—if someone said plead guilty, they did—just [to] be done with it.*
>
> *Judges now look to us for pre-sentence reports and advice; they are hesitant to take a plea before the Native accused talks to us.*[29]

The Co-West reviewers also interviewed other criminal justice personnel to ascertain their perceptions of courtworkers. The non-Indigenous personnels' perceptions were congruent with the courtworkers' perceptions of themselves.

> *As one judge summarized: 'The accused has several ways he can proceed, but he doesn't always know these ways. The Native Counsellor can be of tremendous help by providing me information about this person so I have solid material on what to decide. The Courtworker is very important to the Court. They are a friend of the Court and a friend of the Native accused.'*[30]

This statement, while positive, again illustrates one of the politically contradictory roles courtworkers may have in being a friend of the court and of the accused.

Generally, judges were satisfied with the NCSA courtworkers. Only one judge, whose answer was neutral, did not answer yes to the question: *"Are you presently satisfied with the program?"*[31] It is evident that while NCSA is perceived by some judges as influencing their decisions on disposition, the Co-West reviewers could not quantify the impact of NCSA on incarceration rates.

> *In seeking to determine whether or not N.C.S.A., or for that matter any agency or program, makes a difference in crime patterns or rates, we are faced with an insolvable dilemma. Most of those interviewed felt that N.C.S.A. serves a good purpose, as do other agencies and their programs. In spite of all efforts, however, the crime rate tends to stay the same or rises. In fact, almost all those interviewed felt that N.C.S.A. has not affected the general crime rate, nor has anyone else. They also felt that Native crime has continued at about the same level. The impact of N.C.S.A. and other agencies has been to provide for a fairer treatment of native people and has helped to reduce the incarceration rate.*[32]

It is significant that the Co-West review made a modest effort to collect client perspectives (14 interviews). It is suggested that further research in this area be continued because without this feedback the system runs the risk of re-cycling its own perceptions. Almost all of the clients interviewed were very happy with the Native courtworker service.

> *Yes, to all people, Native and non-Native. I have talked to non-Natives who have used the service and they spoke highly of it.*
>
> *Yes, I have told a lot of people to come here and not to worry so much. They can get good help here. Courtworkers talk in my language and they understand.*[33]

A few instructive negative comments were also collected:

> *They can only do so much and then what happens is O.K. (jail). As long as I feel that they tried all they can.*
>
> *She is pretty good. When you ask her to do something, she tries to help. Others don't do anything. Another one looked at my record and said there's no hope. I was having D.T.'s and couldn't talk. I asked her to but she would not. I don't feel good about it.*
>
> *A Courtworker should help people and talk for them. From where I sit, the worker doesn't have much power. She should speak up whether or not the person is guilty. Speak to the sentence.*

> *I don't believe they do a very good job. Maybe it works where a person needs a translator when he's too shy. Explain charges and know the facts of the case before you advise on a plea. Some of the Courtworkers don't really understand what alcohol and drugs are.*[34]

These quotes have been selected because they balance the almost totally positive feed-back Co-West obtained about the NCSA's Criminal Courtworker Program. They also indicate some areas where improvements are needed in the program.

In its "evaluation assessment" the Co-West review addresses a number of research questions in a candid and helpful way. Comments were also obtained from NCSA on its model, and the fact that these are included in the report's appendix is a further indication of the quality of the study. The researchers also discussed the problems and contradictions of program evaluation. They point out that it is very difficult to measure whether NCSA was able to realize its objective of "*assist[ing] Native people in conflict with the Criminal Justice System to receive fair and equitable treatment before the law.*"[35] The evaluators also argue that in order to place the courtworker program in a context in which it can legitimately be assessed, the entire criminal justice system must be evaluated.

It seems that the federal government suggested the NCSA's objective be utilized as the criterion for measuring the success of a courtworker program.

> *The objective of the Federal Courtworker program was to assist Native people in conflict with the Criminal Justice System to receive fair and equitable treatment before the law. From a theoretical standpoint, this objective would be achieved when Native people received the same treatment, had the same opportunities and*

> *exercised those opportunities in a way comparable to other citizens at all stages of the court process from arrest to disposition.*[36]

Contrary to the federal government's suggestion, both Co-West and NCSA explicitly reject the "equality of opportunity" criterion for deciding what is "fair and equitable." They would argue that treating Indigenous peoples the same as non-Indigenous peoples within the criminal justice system is unfair because Indigenous peoples begin from a disadvantaged position.

The Co-West and Ontario reviews are important contributions to the literature and deserve further analysis and replication.

Indigenization of Adjudication

It is widely held that the over-involvement of Indigenous peoples with the criminal justice system and the quality of their experience within that system can be influenced by indigenizing the forum in which sentencing occurs. Tribal courts and the appointment of Indigenous judges and justices of the peace are seen as a means of partially accomplishing this process.

In Canada there are no tribal courts of the sort found in some American states. However, there has been a long tradition of appointing Indigenous people to act as lay magistrates, i.e., justices of the peace. Appointment of justices of the peace may be made under provincial legislation through order-in-council or under the Indian Act s.107. S.107 justices of the peace were traditionally the Indian agents and this status was an automatic ex-officio role for agents from 1881. Between

1881 and 1894 such justices of the peace were not even appointed by the governor general through order-in-council on cabinet recommendation. Increasingly provincial and territorial governments have appointed Indigenous people to these positions.

In recent times it has been possible for a band council resolution to be passed requesting appointment of a s.107 justice of the peace; the Minister of Indian Affairs has carriage of such requests and appointments are made at the request of the federal cabinet by the Governor-General-in-Council.

As Bradford Morse has observed,

> *it is somewhat ironic to realize that the rising interest in establishing a separate court system for Indian reserves comes exactly one century after this concept first obtained a legislative base by virtue of an amendment to the Indian Act 1881.*[37]

Morse argues that the existing legislative provision under s.107 would allow bands the sovereignty to develop their own court system.

> *The necessity of implementing changes in the way the criminal justice system operates in relation to Indian and Metis people in Ontario is obvious. The s.107 court is simply one of many options available, although it perhaps holds more promise than most.*[38]

There is little empirical literature which looks specifically at Indigenous justices of the peace. The close association of the offices of Indian agent and justice of the peace, and the findings of several studies present them in a negative light. Douglas Schmeiser, for example, discusses problems that arose because non-Indigenous justices were not trained to deal with Indigenous culture.

> *No matter how well-intentioned they are, they lack the experience and training to administer justice in a balanced fashion....Far too often a Justice of the Peace will adopt a peevish or highly moralistic stance towards the native, use his position to promote pet theories, or regard himself as a police agent.*[39]

Schmeiser goes on to cite numerous examples of cases in which justices of the peace exhibited some or all of these traits. The Morrow Commission into the *Administration of Justice in the Hay River Area of the Northwest Territories*[40] also makes reference to the discrimination that Indigenous persons may encounter when appearing before a non Indigenous justice of the peace.

Indigenous Justices of the Peace: An Underemployed Resource for Indigenous Peoples

A 1982 brief submitted by the Ontario Native Council on Justice for Alan W. Mewett's *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace* examined the use, in Ontario, of Native justices of the peace; surveyed Ontario, Saskatchewan, Alberta, the Northwest Territories and the Yukon; and obtained counsel's opinion of the scope of s.107 appointments. The final report, *The Native Justice of the Peace: An Under-Employed Natural Resource for the Criminal Justice System*, which includes the brief, also responds to recommendations made in the Mewett report itself in which special reference to the needs of remote areas and Native communities is made.

The ONCJ report describes the pivotal role which justices of the peace play in Ontario's criminal justice system. The discretion they exercise is isolated as a major factor in the over-representation of

Indigenous people in the criminal justice system.

> *...in the 1980-81 fiscal year....there were five times as many Native male admissions and 15 times as many Native female admissions for short sentences of less than one month and eight times as many Native male admissions and 25 times as many Native female admissions for liquor offences as their share of the population would seem to warrant. Many of these sentences for less than 30 days and for liquor offences would have been imposed by a justice of the peace.*
>
> *In a 1979-80 survey of 513 Native inmates in jails, detention centres and correctional centres throughout ...Ontario....[almost two-thirds] of the Native inmates who were denied bail were refused for reasons other than security.*
>
> *...Decisions concerning the release of those inmates would likely have been made by a justice of the peace and some of the sentences and fines imposed on the inmates would have been given by a justice of the peace ....While the jurisdiction of the justice of the peace is restricted to minor offences, it is most frequently for such lesser offences that Native people are brought before the courts.*[41]

ONCJ argues that Native justices of the peace would offer a better buffer between the police and native people in all the areas where discretion is exercised respecting the freedom of Indigenous people. While Ontario, Alberta, the Yukon, and the Northwest Territories all have "Native J.P. Programs," the Saskatchewan program has been discontinued, and there have been no current s.107 justices of the peace appointed in any region except Ontario. In fact, the survey found that those "Native J.P.'s" who had been appointed were gravely underutilized in Ontario and Saskatchewan; and in other regions, with the exception of the Northwest Territories, were disproportional in comparison to total appointments. Only seven out of a possible fourteen such justices of the peace were regularly serving in Ontario; in Saskatchewan seventeen Indigenous appointments had been made out of four hundred and their

services have been virtually suspended; and in the Yukon there were only six Indigenous justices of the peace out of a total of forty-nine. Half the one hundred ten justices of the peace in the Northwest Territories are Indigenous.

The studies conducted by ONCJ in 1977 and again in 1982 revealed major problems with the existing Native Justice of the Peace Program in Ontario, and these problems are common to all other jurisdictions:

1. too limited authority and status;
2. lack of training;
3. lack of adequate and attractive remuneration; and
4. reluctance to serve as justices of the peace.

ONCJ's recommendations[42] to alleviate these problems were that:

1. more Native J.P.'s be recruited and appointed;
2. a Special Projects Officer on the staff of the Associate Chief Judge of Ontario be appointed to co-ordinate, facilitate, train and recruit Native Justices of the Peace;
3. a rigorous training program be developed; and that
4. reserve circuit courts be established.

Recommendations about remuneration, travel and facilities were also made.

A major theme in the ONCJ report is the recommendation that Indigenous peoples obtain real autonomy with respect to control over adjudicatory institutions. This proposal requires that some recognition of the sovereign status of reserves and the self-determination of Indigenous people become a central feature of reforms to the Ontario Native Justice of the Peace Program. Such recognition would be manifested in many ways including giving ONCJ a veto on the choice of Special Projects Officer; advertising for justices of the peace in Native newspapers; a band council authorization requirement for holding court on reserves; and s.107 justice of the peace appointments based upon band council

resolutions.

A further dimension of this proposal for promoting greater Indigenous peoples' autonomy is the ONCJ recommendation that a project be established in which an Indigenous justice of the peace would sit and hear cases with two elders chosen by the band council. The Mewett report to the Ontario Attorney General conceded that the opinion of reserves should be solicited before court is held or a justice appointed, but was adamant the province should retain the ultimate decision. Reaction to the justice of the peace plus elders adjudicatory panel project was also negative. Mewett found it unacceptable for *"a duly appointed Native justice of the peace being in any way subservient to or answerable to a band council or clan elders,"*[43] and further proposed that a retirement age of 70 be established. As ONCJ has pointed out, this would ignore the traditional importance of the elders as judges and mediators in Indigenous societies.

The ONCJ and Mewett reports reveal a clash of perspectives on law, culture and power. Mewett's biases are statist and do not recognize a plurality of legal systems.

The indigenization of the office of justice of the peace appears to hold considerable potential for giving Indigenous peoples some discretion in the ways they are handled in the criminal process. The tension between western notions of an independent judiciary and non-western institutions such as gerontocracy and subjective community-based justice are the poles in this struggle between the colonial state and the

colonized. The debate about tribal courts to follow betrays the same controversies.

Indian self-government would presumably have the attributes of autonomous adjudicatory institutions and Indigenous common law and codes of legal rules. The indigenized justice of the peace programs may offer a transitional institution although ONCJ's research did not demonstrate that Indigenous justices of the peace were more or less fair or severe in their sentencing patterns.

Since there are no tribal courts, traditional courts, or courts of Indian offences in Canada, the literature on these topics is based on the American experience. Two fairly extensive studies of American tribal courts have been done. These are Olney and Getches' study for the National American Indian Court Judges Association, entitled *Indian Courts and the Future: Report of the NAICJA Long-Range Planning Project* (1978),[44] and Samuel Brakel's study for the American Bar Foundation, entitled *American Tribal Courts: The Costs of Separate Justice* (1978).[45] A Canadian study, Bradford W. Morse's *Indian Tribal Courts in the United States: A Model for Canada?* (1980),[46] tried to determine what Canadian Indian bands attempting to set up tribal courts can learn from the American experience.

Indian Courts and the Future

Olney and Getches believe the major strengths of tribal courts are the deference shown to them by federal courts; quick access to a fair forum; growing support from federal agencies, tribal leaders and organizations; ability to bridge the gap between law and Indian culture; and a dedicated

judiciary. They see the major weakness of the tribal court system to be control of the courts by the United States Bureau of Indian Affairs. They acknowledge that Indian tribal courts

> *...were originally alien institutions...[that] ...are seen by some as arms of the conquering nation. [They conclude that] it is unavoidable that Indian courts must sacrifice some of their status as arms of tribal sovereignty so long as they depend upon the federal sovereign for funds.*[47]

Olney and Getches also concede that tribal courts have been imposed upon Indigenous peoples and closely resemble the dominant court system. They see remnants of Indigenous tradition in the judge's discretion, however, and comment that tradition also plays a part in probate. The authors believe that the strength of tribal courts is in the judiciary because judges are of Indigenous ancestry and therefore understand Indigenous customs and lifestyles. On the other hand, in their view one of the main weaknesses of tribal courts occurs because judges are appointed and therefore susceptible to tribal influence. Other weaknesses include: inadequate tribal laws; dearth of civil cases; need for qualified personnel; lack of dispositional alternatives; lack of planning; and an unnecessarily narrow jurisdiction.

To remedy the defects of the present system, Olney and Getches have developed a set of standards for Indian judicial systems which they believe would greatly enhance the quality of tribal courts. Their model court and legal system was developed from observations of numerous existing tribal courts. It includes a five-year plan to establish such a legal system and a proposed budget. Their proposed Indian Judicial System

has seven major attributes:

1. laws must be codified and revision should be easy;
2. traditional customs must be included in laws;
3. tribal courts must have clearly stated jurisdiction;
4. there should be separate juvenile codes;
5. there should be separate facilities for law enforcement personnel and courts;
6. the courts must be independent of the band council, or if this is against tradition, individual cases must be assured independence; and
7. the tribal court should have the authority to review tribal legislation and/or administrative decisions for tribal violations.

They conclude that Indigenous peoples are better protected in tribal courts than in state or municipal courts because in the former there is at least the assurance that defendants will be informed of their rights if necessary. As well, the court will be conducted in a manner that is easier for Indigenous peoples to comprehend.

> *It was...the opinion of most of the survey teams that the defendants received better protection in Indian courts than in nearby state and municipal courts. In one instance observed in a nearby non-Indian court, the judge first asked those who thought they were guilty to step forward, sentenced them, and then read the remainder of the defendants their rights.*[48]

American Tribal Courts: The Costs of Separate Justice

Samuel Brakel's report for the American Bar Foundation comes to conclusions which contrast sharply with Olney and Getches' study. Brakel's methodology was a combination of observing tribal and mainstream

courts in neighbouring jurisdictions, as well as conducting interviews in these geographical areas. Brakel is extremely critical of tribal courts for their lack of professionalism and due process. He concludes that reservations are *"cultural no-man's land[s]"*[49] in which traditional methods of maintaining law and order have been lost. Brakel further argues that the high volume of serious crime on reservations indicates a breakdown in social processes and social control. In his opinion, tribal courts should be abandoned and Indigenous peoples should be tried in mainstream courts where he feels they would be assured of due process.

Brakel does make recommendations, however, for those tribal courts that will remain. He feels that more professionalism is needed in the courts and that judges should be less vulnerable to political and social pressures from tribal councils and family connections. Jurisdiction for major crimes should be given to state or municipal authorities, and non-Indigenous legal personnel such as judges and prosecutors should be brought into tribal courts to try major cases.

From his observations of jurisdictions adjacent to reserves Brakel concluded:

> *Anti-Indian prejudice does not appear to be pervasive or systematic in the white courts, [rather] the problem is how to deal with the Indian's negative expectation of white justice.*[50]

Clearly Brakel's analysis is motivated by a "blaming the victim" ideology and from his vantage point Indigenous peoples only get what they expect and, perhaps, deserve. In contrast to Brakel, Olney and Getches found jurisdictions bordering on reserves to be prejudiced against

Indigenous defendants.

Indian Tribal Courts in the United States: A Model for Canada

Bradford Morse (1980) attempts to apply the experience of American tribal courts to the Canadian situation. His study, *Indian Tribal Courts in the United States: A Model for Canada?*, basically outlines what legal rights bands may exercise under the Indian Act. The author does caution Indian bands or Metis and Inuit communities to be aware of possible repercussions before they attempt to set up courts; unfortunately, he does not discuss in any length what these repercussions are or how they can be dealt with.

Russell Lawrence Barsh and J. Youngblood Henderson (1976) provide some insights into possible problems with the American Indian Civil Rights Act. They identify its Bill of Rights and due process stipulation as a source of difficulty for tribal courts:

> *The Model Code authorization was enacted as part of the so-called 'Indian Bill of Rights,' which enumerates those constitutional requirements that Congress, in 1968, deemed it necessary to extend to Indian tribes. In fact, at that time, Congress had before it evidence that approximately half of all reservation courts were already substantially in compliance with Indian Bill of Rights limitations, and that the perceived 'abuses' of reservation courts—absence of the right to counsel, self-incrimination, jury trial, and appeal—were aggravated if not caused by the inadequacy of tribal law and order budgets. With the passage of the Indian Bill of Rights, tribes instantly experienced increased costs—without any commensurate increase in budgetary assistance—in bringing their procedures up to standard and defending civil rights challenges in the federal courts. Moreover, a special task force was established within the Justice Department to investigate individual complaints against tribes, thus assuring that the cost to*

> *a private citizen of prosecuting tribes would be nearly zero. The ultimate result has been extreme reluctance on the part of tribes to engage in aggressive law reform, and a tendency to avoid additional costs by dropping charges against anyone who appears willing and able to bring a civil rights attack on the proceedings. If the tribes follow the Model Code, however, there can be no conceivable challenge in the federal courts, where as if an independent code is drafted it will be a sure target for federally-subsidized attacks on every section. Congress could not have chosen a better way to neutralize tribal government, or to assure widespread adoption of the Model Code.*[51]

By way of contrast Morse states:

> *It is the author's opinion that the establishment of Indian and Inuit courts would be extremely helpful in promoting self-determination within the Canadian state and in ameliorating the negative consequences which flow from the present situation. It is suggested that this is the best and most effective way of advancing these goals. The timing is also very appropriate. With the far-reaching discussions occurring on major revisions to the Indian Act and the Canadian constitutional framework, the door is now open for new, innovative approaches to resolving old problems. What seemed unlikely—if not impossible—several years ago, is now being regarded as a serious alternative, and, in some areas, being accepted as part of the future of Canada. There will undoubtedly be logistical difficulties and political problems in taking such a bold initiative. It is the author's belief, however, that the idea may very shortly become a reality in spite of all the inherent stumbling blocks.*[52]

While Morse's essay is optimistic about the prospects for tribal courts in Canada, it is crucial that policy-makers and Indigenous people structure a system that does not contain the type of flaws Barsh and Henderson have found in the United States' system.

Morse's report is a thorough analysis of the legal context and constitutional feasibility of constructing tribal courts in Canada.

However, the politics involved in assembling such a system have not been addressed. A study of these politics, as well as a proposal for a model court or pilot project, would seem a logical next step.

NOTES ON CHAPTER 3

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21. Ibid., pp.93-94.

22. Ibid., p.98.

23. Ibid., p.25.

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26. Canada, Department of Justice, Evaluation and Statistics Section, Policy Planning and Development Branch, *Criminal Courtworker: Native Counselling Services of Alberta, A Program Review and Evaluation Assessment*, by Lorraine Fearn and George Kupfer (Ottawa, Ont.: Department of Justice, 1981).

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30. Ibid., p.59.

31. Ibid., p.65.

32. Ibid., pp.159-160.

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37. Sylvia Maracle, Chris McCormick, and Stan Jolly, *The Native Justice of the Peace: An Under-Employed Natural Resource for the Criminal Justice System* (Toronto, Ont.: Ontario Native Council on Justice, 1982), p.90.

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46. Bradford W. Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (Saskatoon, Sask.: Native Law Centre, University of Saskatchewan, 1980).

47. Olney and Getches, pp.39,194.

48. Ibid., p.45.

49. Brakel, p.13.

50. Ibid., p.93.

51. Russell Lawrence Barsh and J. Youngblood Henderson, "Tribal Courts, the Model Code, and the Police Idea in American Indian Policy," *Law and*

Contemporary Problems 40:1 (1976) 25-26.

52. Morse (1980), p.30.

CHAPTER 4: SENTENCING INDIGENOUS PEOPLES, OVER-REPRESENTATION IN PRISONS, AND ALTERNATIVE DISPOSITIONS

Introduction

Chapter 4 reviews the available research on over-representation of Indigenous peoples in Canada's prisons. Explanations for this basic problem are examined, including the contribution of the sentencing process. Possible implications of over-representation for correctional and prison programs are explored. Some suggested means of making judicial dispositions and correctional programs more relevant to the situation of Indigenous people and reducing their involvement with the criminal justice system are also made.

It was the discovery of the "disproportionate presence" of Indigenous peoples in Canadian prisons, as Hagan[1] describes it, which ultimately directed researchers to begin looking at the involvement of Indigenous peoples with other criminal justice processes which precede imprisonment. Ordinarily, accused persons are processed as separate entities by the police as well as by court officials. They are not brought together as a group, nor are they likely to be considered by researchers for their group characteristics until they are remanded in custody or sentenced as prisoners. To the extent that Indigenous people are distinguishable in criminal justice systems, their presence as a distinguishable group is likely to be most apparent in prisons.

Since there is a disparity in the number of Indigenous as opposed to non-Indigenous inmates in the makeup of prison populations, one possible source of that disparity has been identified as the discriminatory discretionary practices and powers of officials in the

criminal justice system, particularly those who may exercise influence over which offenders are apt to be imprisoned. Police discretion, as already discussed in Chapter 2, has considerable impact upon which accused are taken to criminal court and for what charges. Police, along with officers of the courts such as crown prosecutors and defence lawyers, in effect assist in a process of sorting out potential candidates for prisons and for penalties which may hold open the option of prison should default occur.

The research literature does not reveal much about the exact nature of the influence of these decision-makers upon Indigenous peoples. In particular, very little is known about the rationales behind discretionary decisions of judges. Judges, through their choices of dispositions and sentences, after all, effectively control prison intakes and hence the extent of over-involvement. Questions which arise given the concrete evidence of over-involvement of Indigenous peoples in prisons are: Is this over-involvement accounted for by the differential sentencing practices of judges? Are judicial decisions influenced by other system officials? Or do Indigenous people commit a disproportionate number of imprisonable crimes and does this account for the disproportionate presence of Indigenous people in correctional institutions?

The high proportion of Indigenous prisoners, especially in particular regions in Canada, has given rise to further questions in the literature about the recidivism level of Indigenous inmates in prison programs: Are conventional prison programs, conceived for and operated by non-Indigenous people, suitable or completely inappropriate for Indigenous prisoners? Some of the literature suggest that modifications

and adaptions are essential in prison programs. Likewise adaptions are crucial to recognize cultural differences and thus meet the unique needs of Indigenous peoples committed to their control. Other questions also arise in the research literature. For example, is the required reform strategy simply a matter of adjusting prison and correctional program delivery systems by such means as sensitizing non-Indigenous staff or even the full indigenization of programs and staff? Or, are there other kinds of judicial dispositions or sentences such as non-custodial penalties more appropriate to Indigenous people's socio-economic circumstances? Some of the literature reviewed begins to grapple with a number of these solutions.

A Model for Examining the Literature

In previous chapters, the gross over-representation of Indigenous peoples in prison is placed in the context of the colonization of Indigenous peoples, the development of underdevelopment, their subsequent dislocation, and consequent socio-economic and legal adversity. Their adversity is characterized by welfare dependency, a marginal existence in urban areas, and economic vulnerability and vulnerability to arrest on reserves and in cities. This dependence is compounded and perpetuated by their encounters with the criminal justice system which, as Ericson and Baranek[2] suggest, creates "dependants" rather than "defendants." In their interactions with the criminal justice processes, particularly at the sentencing stage, Indigenous peoples cannot easily marshall social resources, nor can they point to social support systems which would help them to be perceived by the courts as being other than "problems" or

"risks" to society to be dealt with by custodial correctional responses and punishments.

In this model, corrections and its prison facilities are seen as passive receptacles which do not control their intake. Input into prison is influenced by a complex interaction of officials holding discretionary powers. Ultimately the choice of prison is made by judges, although restricted by mandatory penalties and by police charging practices concerning offences carrying mandatory penalties. Sentencing can be conceived as a separate process influenced by lawyers for the crown and defense, by the availability and quality of community resources, and by probation officer's assessments and sentencing recommendations on such sensitive matters as personal "problems," community supports, questions of stability, and "risk" to communities. The disadvantage of the Indigenous prisoner is his/her inability to present a favourable socio-economic profile which could promote eligibility for forms of parole and non-custodial sentences as well as prison programs.

We assume prison is the ultimate means of maintaining order; that is, order in the dominant society. As with findings in the other components of the criminal justice system, the solutions to problems identified in this portion of the literature repeat the theme of cross cultural education, particularly for judges and prison personnel; the indigenization of prison, probation, and parole staff; and the development of decision-making forums and services that are totally controlled by Indigenous people.

Over-Representation in Prison

The studies which established over-representation in prisons emphasize both their limitations as well as their developmental aspects.

> *An analysis of admission statistics for the 1980-81 fiscal year from the [Ontario] Ministry of Correctional Services reveals that native men and women are continuing to be incarcerated at a level which is two to twenty-five times the rate that their share of the total population would seem to warrant—depending on the length of sentence, type of crime, and age category. Although natives (status and non-status Indians and Metis) made up only two per cent of Ontario's total population in 1981, they accounted for: eight per cent of the total male admissions and seventeen per cent of the total female admissions to the correctional system.* [3]

These jail and correctional institution admission statistics are an indication of the persistence of the problem of over-involvement of Indigenous men and women in prisons. This section looks at the evidence from prison admissions and at attempted explanations of this reality, plus the limitations of existing research.

Persistence of Disproportionate Prison Admissions

Earlier surveys of prison admissions in Canada lacked systematically collected data; it is now possible, however, because of more systematic data collection in some Canadian provinces and in the territories, to make general statements about the extent of over-representation of Indigenous peoples in prison populations. As Jolly writes:

> *...the native rate of incarceration [in Ontario in 1980-81] was almost four times the non-native rate of incarceration—2,027 per 100,000 estimated native population—compared to 530 per 100,000 of non-native population.* [4]

In contrast with some other Canadian jurisdictions the Ontario figures are considered comparatively low. Statistics Canada and its Canadian Centre for Justice Statistics are now able to provide data from several provinces and the territories on both "native" and "non-native" remanded and sentenced prisoners. The rates of "native" admissions from 1978 to 1981, both remand and sentenced, as a percentage of total admissions to provincial and territorial government facilities (prisons) are noted.

> *For those jurisdictions represented by the provincial average, there was no discernible trend in the native admission rate during the three years in question. However, there is much variation across jurisdictions, ranging from 85% in the Northwest Territories to 3% in Newfoundland during 1980/81. Saskatchewan (60%) and the Yukon (55%) were comparatively high while Ontario (8%) was low. To a large extent these native admission rates are a reflection of the numbers of natives in the standing adult population in each jurisdiction.*[5]

It is now possible, therefore, to compare the 1980/81 data with evidence of over-representation gathered by Douglas Schmeiser for the Law Reform Commission of Canada and published in 1974. His report was primarily concerned with gathering information on Indigenous peoples' involvement in *"one aspect of the criminal process—detention and punishment."*[6] For the most part he used data for the period 1970 to 1972.

In 1970/71, for example, Saskatchewan's Indigenous population was estimated to be 12.7% of its total population, but people of Indian and Metis origin made up 53.8% of all admissions to Saskatchewan's correctional centres.[7] One decade later, 1980/81, Saskatchewan reported that 59% of its male and 87% of its female remand and sentenced admissions to correctional centres were Indigenous people while their

proportion of the overall Saskatchewan population is not indicated.[8]

While the years for which data were available are not consistent in the case of British Columbia, and no accurate admission data were available in 1970/71 for Ontario and the Northwest Territories, the following summary table of comparable admission statistics illustrates the persistence of over-representation over the last decade.

Table 3

Admission of Indigenous Peoples to Correctional Institutions

(as a percentage of total admissions)

Jurisdiction	1971 Estimate of Natives in Total Population	Proportion of Admissions of Indigenous Offenders	
		1970/71	1980/81
British Columbia	5.0%	*15.0%	17.0%
Yukon Territory	47.5%	53.0%	55.0%
Northwest Territories	-----	-----	85.0%
Alberta	5.5%	25.7%	22.0%
Saskatchewan	12.7%	53.8%	59.0%
Manitoba	12.0%	50.9%	52.0%
Ontario	2.1%	-----	8.0%

Sources: Law Reform Commission of Canada. *The Native Offender and the Law*, by Douglas A. Schmeiser, Hans W.B. Heumann, and John R. Manning. Ottawa, Ont.: Information Canada, 1974.

Statistics Canada, Canadian Centre for Justice Statistics. *Correctional Services in Canada 1980/81*. Ottawa, Ont.: Minister of Supply and Services Canada, 1982.

*1971-1972 figures.

Schmeiser concentrated his examination upon institutions under provincial or territorial jurisdiction; however, he specifically examined data in two federal penitentiaries. That data does not permit comparisons with current admissions to federal penitentiaries. Nonetheless, for illustrative purposes it is useful to accept the 1980/81 statement that

"Natives consistently represented 9% of the federal penitentiary population,"[9] (not admissions) for the years 1978 to 1981.

Development of Canadian Evidence

Although the evidence of the extent of Indigenous over-representation in the overall criminal justice system is not considered by critics to be adequate, the statistics on prison admissions and to some extent other dispositions are considered more accurate. The development of more adequate data has accurred gradually through a variety of methods.

Indians and the Law (1967),[10] for example, was a deliberate search for facts to substantiate the concerns of interested citizens, "Indians," and "non-Indians," as well as a department of the federal government about the possibility of over-involvement in prisons. Conceived in 1964, the study was completed in four phases which included the collection of admission data in several Canadian prisons in August 1966. Undertaken by a non-governmental organization for the then Department of Indian Affairs and Northern Development, it utilized regionally located field staff, particularly in Western Canada, for the gathering of local data and information. Ironically, it did not venture into the Northwest Territories. The project concentrated upon the issue of over-involvement in "Indians" in prison while recognizing the inadequacy of existing information. Ultimately it made a series of policy recommendations stressing, among other matters, that jail was inappropriate for

"Indians" who committed liquor and liquor-related offences.

A second major survey, *The Native Offender and the Law* (1974),[11] like the Law Reform Commission of Canada documents of the time, was intended to collect facts and present them for public attention and discussion. Although Schmeiser's report drew general conclusions about the disproportion of Indigenous offenders in prison populations, their use of alcohol, types of offences, recidivism rates, and sentences received, he considered it only a beginning descriptive statement. He intended it to be a statement upon which a more complete picture could be developed later.

Schmeiser's survey focused upon prison admission data, specifically on Indian, Metis, and Inuit involvement with the criminal justice system. Some sampling of western penitentiaries and RCMP detachments was undertaken but the bulk of the data was gathered from correctional departments and prisons, particularly in western Canada. Saskatchewan provided, as it had earlier, the most complete data. Most of the statistics came from the period 1970/71 but some were as recent as 1973.

The report contained the most complete data then available but recognized enormous gaps in information. It substantiated the disproportionate jailing of Indigenous people. It drew attention to the grossly disproportionate jailing of Indigenous women in some provinces. It confirmed that the Indigenous people in the prison systems it surveyed were involved in less serious crimes than were non-Indigenous people and that many were in prison for provincial or municipal offences, often for non-payment of fines. It concluded that, *"much, if not most, Native crime is associated with the use of alcohol."*[12]

Indigenous peoples' organizations in Canada have contributed their own perceptions of the problem of over-representation in prisons in a number of published reports. The *Report of the Metis and Non-Status Indian Crime and Justice Commission* (1977), for example, does not set out to document over-representation. It assumes over-representation as a fact and attempts to identify among its sample of 311 pententiary inmates (all of Status, Metis, Non-Status, and Inuit background) those criminal justice experiences and socio-economic factors which appear to contribute to the high rate of imprisonment.

> *We also believe that the causes of the high rate of Native imprisonment lies [sic] largely in the social situation in which Native people live in this country which are best described as put forward at the Habitat Conference in 1975.*[13]

The social and economic conditions described at the Habitat Conference—inadequate housing, sewage and water supply; low incomes; unemployment and welfare dependency—are identical to those dimensions of socio-economic adversity already described in Chapter 1. In making a series of recommendations, some about prisons and prison-related services, the Commission deplored the failure of policy-makers to act upon the previously identified problem of over-representation, and the repeated recommendations made to deal with it in the previous decade.

The views of quite diverse Indigenous peoples' organizations and services were well documented for the 1975 National Conference on Native Peoples and the Criminal Justice System at Edmonton. The work of Michalis and Badcock (1979)[14] is intended as a synthesis of the presentations and perceptions made by Indigenous and non-Indigenous peoples over the previous decade. Their synthesis is, they acknowledge,

"mostly from a Native point of view."[15] Among the issues they identify are those which, if acted on, would address the problem of the use of prisons for Natives and the nature of institutional services, for Indigenous people.

According to Jolly, the Ontario Native Council on Justice developed out of the Edmonton conference as a mechanism for involving "Native" people in the *"planning and delivery of services associated with criminal justice and native people."*[16] It is, in Jolly's opinion, unique in Canada. It has co-operated with the Ontario Ministry of Correctional Services to produce two related reports on native inmates in Ontario. The first survey in 1978 by Irvine[17] was followed in 1981 by a more extensive report by Birkenmeyer and Jolly which contains no comparative data for non-Native populations.

> *The Native Inmate in Ontario describes the criminal justice experience of a sample of inmates including their current situation, factors related to the offences, the trial process and their prior experience with the criminal justice system. The report details their socio-economic situation, the extent of alcohol and drug abuse and their participation in treatment programs, their social and cultural isolation, and their current problems. The views of the inmates themselves are outlined in the study. Finally, the report documents the fate of the native inmates following their releast.*[18]

ONCJ found it imperitive to specifically identify the issue of over-representation in more recent public documents,[19] with the Kenora area of Ontario as a special concern.

> *The Kenora area in northwestern Ontario, where native residents are estimated to make up about 25-30 per cent of the total population, is a focus of special concern. In 1980-81, natives accounted for 75 per cent of the total male admissions and 94 per cent of the total female admissions to the Kenora Jail. It is surely disconcerting that in 1980-81 the native male admissions to one institution, the Kenora Jail, constituted 26 per*

> *cent of all native male admissions for the whole province. Native female admissions to the same jail amounted to a staggering 47 per cent—almost half—of all native female admissions to the entire correctional system.*[20]

As early as 1975 at least one province, British Columbia, was able to analyze by computer the extent to which Indigenous peoples were placed on probation, remanded in custody, or jailed in default of fines. The first report, by Hartman and Muirhead,[21] not only provides comparative data on dispositions but also attempts an explanation of Indigenous over-involvement based upon structural and cultural factors considered significant for Indigenous peoples in British Columbia.

In Alberta, the Kirby Board of Review inquiry into the *Administration of Justice in the Provincial Courts of Alberta* (1978)[22] considered the issue of "Native" people in the administration of justice in one of its reports. The Board of Review, under Chairman Mr. Justice Kirby, examined 1976/77 admission statistics, met Indigenous peoples on their reserves, and received submissions from Indigenous organizations. The Indian Association of Alberta was represented by counsel at the hearings. That review identified some seasonal differences in the admission of "Natives" in different parts of Alberta and made specific recommendations to deal with the problem of imprisonment for default of fines.

In Saskatchewan a unique attempt to forecast the admission rates of Indigenous and non-Indigenous inmates to 1993 was made by Hylton (1979)[23] based upon 1977 estimates of the Treaty Indian population in Saskatchewan and upon 1977 correctional data which became available for the first time in 1976. Hylton's forecasting is based upon information on ethnicity,

legal status, age, and sex distributions. Essentially, the study attempts to guage the impact of changing demographic factors in Saskatchewan upon levels of incarceration. It took note of the differences between "Natives and non-Natives" in the sixteen to thirty age bracket, the "high risk" age for admission to correctional centres. For non-Natives, it was likely that the number at risk would decline by 1993 while for Natives the numbers at risk would increase.

Hylton found that male Treaty Indians:

> *....had 186.2 admissions per 1,000 population over [age] fifteen, whereas the corresponding rate among male Metis-non-Status Indians was 59.5 and among non-Natives it was 5.0. Thus, male Treaty Indians over fifteen were 37 times more likely to be incarcerated when compared with non-Natives, and Metis/non-Status Indians were 12 times more likely. When compared with non-Natives, female Treaty Indians over fifteen were 118 times more likely to be incarcerated and female Metis/non-Status Indians were 25 times more likely to be incarcerated.*[24]

Based upon the changing demography of the province, Hylton also predicted an increase of 41% in correctional centre admissions by 1993 *"without substantial changes to the system,"*[25] with 80% of all admissions being Treaty and Metis/non-Status Indians. He explored a number of aspects of incarceration including the likelihood of recidivism; incarceration rates for males and females, Native and non-Native, Treaty and Metis/non-Status; and the likelihood of being incarcerated by age twenty-five for those categories. His findings, he cautions, provide further evidence *"for the need to address fundamental social and economic problems facing peoples of Indian ancestry."*[26]

In a recent paper LaPrairie notes the absence of any systematic exploration of the relationship of Native women to the overall criminal justice system. But she cites clear evidence that over-representation of Native women in Canada's prisons is even greater than is the case for their Native male counterparts.[27]

The Nature of Explanations of Over-Representation

Perhaps the most comprehensive and effective analysis of Canadian research or surveys which try to explain Indigenous over-representation in the criminal justice system, including prisons, is found in the work of Verdun-Jones and Muirhead.[28] They point out a number of fundamental problems with research in this area.

As has already been indicated in Chapter 1, they suggest that any analysis which is to have an impact on policy-making in Canada must first be related to:

> *...a broad theoretical framework capable of integrating socio-economic, socio-political, historical, and anthropological perspectives; only then shall we know if programs are mere "band aids" tacked onto symptoms of social disintegration or whether they at least promise to set us upon the correct path way towards coping with the problems generated by the status of native peoples in Canada.*[29]

They are critical of criminologists who *"seem to be bound hand and foot by a number of quantitative research techniques"*[30] and/or who appear to concentrate upon criminal justice decision-making while ignoring socio-economic and socio-political contexts. They offer a fundamental caution which is particularly apt for much of the research already conducted on the relationship between the

> *so called 'native offender' and the criminal justice system. Unfortunately, it is only too easy to construct theories about "native" criminality while nevertheless evading the implications of the fact that the term "native" applies equally to the Inuit living in an isolated community in the frozen tundra, to the Indian living in a reserve in suburban North Vancouver, B.C., to the Indian living in a small rural reserve in Alberta, and to the migrant Indian passing through the urban skid row. Criminal justice analysts have generally failed to discuss systematically both the similarities and differences between the offences of Indian, Inuit, and other minority ethnic groups in Canada, between rural and urban crime involving natives, between on and off reserve offences, and between native offences in a range of diverse geographical locations.*[31]

In so far as disproportionate representation is concerned, they point to:

> *...a remarkable paucity of sophisticated quantitative research into the relationship between Canadian native peoples and the criminal justice system. Relatively few studies are based on systematic comparison between natives and whites in terms of a number of significant variables; instead, much of our information derives from official government sources and is essentially of a "book-keeping" character.*[32]

According to Verdun-Jones and Muirhead, one of the "social conditions" created by *"the effects of colonialism, chronic poverty, racism, and legal dependency"*[33] is the comparatively high probability of incarceration of Indigenous peoples. In British Columbia they suggest women have four times the probability of incarceration and men twice the probability compared to their non-Indigenous counterparts.

As early as 1964, in a comparative study of Indians and Whites, Harding identified the issue of over-representation of Indian-Metis in a Saskatchewan jail. The jail experience, he argues,

> *...does not have the intended, penal, connotation to people of Indian ancestry. In all likelihood, it has the opposite; a form of "paternal" meaning to them. It provides good food, shelter, and clothing, things about which the Indian-Metis typically has uncertainties.*[34]

In addition to studies which provide explanations based upon the underlying socio-economic conditions of Indigenous peoples, other ideas have been advanced in the literature such as the phenomenon of urban migration; changing demography such as age; relationships between alcohol use and prison; and sentencing options as well as practices in Canadian courts. This section will survey these explanations.

Underlying Socio-Economic Conditions

The first Canadian study on over-representation, conducted by the Canadian Corrections Association,[35] began with the assumption that economic conditions along with "cultural patterns" and minority status had some bearing on the disproportionate imprisonment of Indigenous peoples. Their study method, however, tended to ignore those conditions and instead concentrated upon the effects of criminal justice processes and the adequacy of services for Native peoples. Somewhat similarily, the Kirby board of review[36] alluded to the socio-economic problems of Native people including unemployment, poverty, welfare dependency, and lack of educational and recreational programs, but its final explanations seem more closely related to the inability of Indigenous offenders to meet fines for liquor-related offences or to have access to detoxification program options to prison.

Poor economic conditions were the only common demographic characteristic of inmates in Irvine's study of *Native Inmates in Ontario.*[37] These variables included backgrounds of poor education and poor employment histories. In contrast, except for passing references to the differential availability of probation services in rural areas, the major report on admissions by Schmeiser[38] is silent on the matter of socio-economic conditions.

In their effort to identify specific issues concerning Indigenous people and criminal justice, Michalis and Badcock also stress, as an underlying issue, Indigenous peoples disadvantaged status, both socio-economically and legally.

> *Social disintegration is endemic because few Native people can pursue traditional lifestyles, present socio-economic conditions are deplorable, and the population is suspended between two conflicting value systems—that of the Native and that of the rest of Canada.*
>
> *The manner in which the justice system intervenes in Native peoples' lives is counter-productive, both from the Native peoples' point of view and from the point of view of the justice system. Since Native people seem to be mainly involved with the justice system as criminal offenders or as defendants in child welfare actions, the justice system inevitably contributes to social disintegration by such actions as taking children from their parents or incarcerating offenders away from their home community.*[39]

The Chairman of the Metis and Non-Status Indian Crime and Justice Commission, Harry Daniels, was even more critical in his explanation of the disproportionate use of imprisonment.

> *It became glaringly apparent that a major contributing factor was the lack of a meaningful economic base in the majority of communities that the prisoners came from. This is not a phenomenon unique to the Native people of Canada, but one that persists throughout the*

> *world where one segment of society has a colonial relationship with another. As a supposedly conquered people we have been denied and effectively kept out of the institutions and frameworks that would be considered as having a positive effect on the national fabric. Being denied an economic base has kept us at or below the bottom rung of the socio-economic ladder, which prevents us from even dealing with our day-to-day survival in a meaningful way. Unless we can plan in a realistic and objective manner our own future as a nation of people and are afforded the facilities to do so, we cannot in any intelligent manner think in the broader terms as being an integral part of the Canadian mosaic.*[40]

Although he does not speak for the Ontario Native Council on Justice, Jolly's views must surely have been informed by his extensive experiences with that Council and by direct experiences in services for Indigenous people. He makes abundantly clear his own explanation for the high ratio of Natives in prisons.

> *The governments of Ontario and Canada must summon the will, the commitment, and the public support to launch a massive and coordinated attack on the deeply rooted imbalance between the dominant white society and its native peoples and must bring about, in cooperation with native people, a meaningful redistribution of income, wealth, economic opportunity, and political power from those who have to those who have not so that native citizens can vigorously and systematically tackle their own problems. This kind of structural rather than palliative change is ultimately the only real native 'crime prevention program.' In other words, there will be a change in the ratio of natives to non-natives inside the prison when their is a fundamental change in their relationship outside.*[41]

Urban Migration

One related outcome of the socio-economic condition of Indigenous people is the impact of migration resulting from the development of underdevelopment in rural areas. Several writers advance this

kind of explanation. Hartman and Murihead[42] in British Columbia were not satisfied that theories of the culture of poverty or conflict with the dominant culture were sufficient to explain the appearance of Natives in their correctional system. They argue, instead, that four factors are of particular significance. First, most Indigenous people in British Columbia live in rural areas but usually appear in court in urban areas. Secondly, Indigenous peoples' employment is frequently seasonal, thus forcing a migration to the cities. Thirdly, in the cities, the migration behaviour or transiency is monitored closely by the justice system, presumably by the police. This monitoring is made possible by the visibility of transient Indigenous people. The final factor which may reinforce their chances of entering the system is the absence of a cash economy among most Indigenous groups.

Analogously, the Metis and Non-Status Commission[43] argued that the Native population most at risk comes from rural areas where lack of economic development and lack of community facilities (underdevelopment) result in the "forced" migration of young people unprepared to cope with urban life. In their sample of native penitentiary and territorial correctional inmates they discovered that 45% had spent *"some or a lot of time"*[44] in downtown areas or on skid row. Hylton[45] makes similar reference to the impact of urbanization and migration in Saskatchewan cities but has not related these factors directly to his specific predictions on future admissions.

Demographic Change: Age

Hylton[46] is alone in his study of admissions and the use of shifting demographic factors such as age as a partial explanation for anticipated increases in the incarceration rates of Indigenous peoples in Saskatchewan. The greatest proportion of prison admissions, according to Hylton, come from the sixteen to twenty-five age group. This is the age grouping in which there is the highest risk of becoming incarcerated. Currently there is a "bulge" in this age group for non-Indigenous people in Saskatchewan and this group should now be contributing maximum numbers to incarceration. While the "bulge" in the sixteen to twenty-five age group in the Indigenous population at risk has not yet occurred, he predicts it will do so in the next fifteen years. Then an already disproportionate admission rate for Indigenous people will be that much higher as the "bulge" has its full impact provided changes are not made in the system. Hylton's thesis and method of statistical extrapolation is especially valuable to planners interested in forecasting correctional populations.

Alcohol and Crimes of Indigenous Peoples

Without exception, Canadian studies of prison admissions data establish alcohol as a major factor directly or indirectly involved in the crimes of Indigenous people. The direct role is in the violation of liquor laws and liquor-related driving laws. Indirect involvement is suggested by the self-reports of inmates having been under the influence of alcohol while committing offences or by the assumption that certain offences are committed in order to obtain further alcohol

supplies.

Schmeiser (1974) concludes that much, if not most, "Native crime" is associated with alcohol use.[47] Kirby (1978) indicated the Native inmates were being sentenced three times more frequently for alcohol-related offences than non-Natives and, further, that in spite of their minority position in Alberta they accounted for 72.1 per cent of the "more serious" offences related to alcohol.[48] Birkenmayer and Jolly (1981) report on Ontario admission statistics at a time (1979/80) when "Natives" were being incarcerated at a rate 4.24 times greater than non-Natives. They found that of those admissions, 55% of the convictions *"against Native persons were for liquor offences."*[49] In their sample of Native offenders, the majority of inmates (84%) reported that they *"were consuming alcohol just prior to their offences."*[50]

> *The results of this survey show that a significant number of charges against the Native inmates related to liquor violations. The proportion of alcohol offences among the female sample was about twice the rate among the male sample. An exceedingly high proportion of the inmates themselves admitted that the use of alcohol was involved in the crimes for which they were incarcerated.*[51]

At Frobisher Bay in the Northwest Territories Finkler (1975) referred to the *"criminogenic role of alcohol"*[52] as he documented the disproportionate number of convictions of Eskimos for offences in which alcohol was a factor. He acknowledged that court data may very well reflect a differential charge-rate for non-Eskimos.

> *Discussions with those engaged in socio-legal control in Frobisher Bay have ascertained that the majority of infractions are liquor related. Specifically, in addition to violations of the Territorial Liquor*

> *ordinance and charges for impaired driving, alcohol has been a predominant factor in physical and sexual assaults, property offences such as wilful damage, petty theft, or breaking and entering, while intoxicated, to search for liquor or goods to exchange for alcohol.*[53]

Differential charge-rates were evident as well in a Regina study of public drunkenness analyzed by Harding.[54] Of those arrested for public intoxication, 30% of the Indian people, 21% of the Metis people and only 11% of the non-Native people were actually charged.

In their sample of penitentiary inmates, the Crime and Justice Commission (1977) were able to identify only 10.07% of all admission offences where no alcohol or drug was involved.[55] This is remarkably similar to the self-reported data of the Birkenmayer and Jolly study. The difficulty, as Verdun-Jones and Muirhead argue, is that relatively few theoretical explanations of the relationship *"between alcohol and native criminality exist in Canada."*[56]

Several writers have explored the risk of arrest inherent in the public drinking of some Indigenous groups. Hawthorn, Belshaw and Jamieson[57] argue that in the "Indian" communities they studied, "obvious drinking" distinguished the Indigenous from the non-Indigenous pattern. Among the people studied, little prestige is associated *"with 'holding' liquor; more is associated with getting drunk."*[58] They suggest that personal and social tensions are relieved by intoxication; that public drinking establishments do not remove Indigenous people until they are drunk; and when they are removed, they are often subject to police intervention. Finkler refers to a similar hazard among Inuit citizens in Frobisher Bay.

> *There are certain characteristics of Inuit behaviour, when intoxicated, that increase the likelihood of police intervention. Inuit, while in a state of intoxication, may go into any house that is open in order to eat or lie down and sleep. Frequently, the occupants may resent this turn of events and react by calling the police. This appears to be one of the major differences between whites and Inuit while intoxicated. The non-Inuit will invariably return to his own house to sleep off the effects of the alcohol, whereas an Inuit tends to delay the conclusion of the evening's activities by intruding in other people's houses or by loitering in public places.*[59]

Both Harding (1980) and Brody (1971) approached the issue of public drinking and risk of arrest from a broader, socio-economic perspective. Harding examined the interrelationships between unemployment, family breakdown, and public drunkenness, and suggests that police, courts, and jails are used to fill a vacuum in social and economic policies. Specifically he argues that government development, as well as the private development it encourages, have accelerated the destruction of the downtown habitats of the "skid row," "down and outer" population which is likely to create additional pressures on the police and the "drunk-tank" for shelter.[60] The majority of those arrested for public drunkenness in Regina in 1977 were male, Native, unemployed, with grade 10 or less education, under 31 years old, and of blue collar occupation. Brody speaks of the futility of trying to deal with skid row drinking through punitive, medical, or educational approaches.

> *The skid row Indian is unlikely to find in the standard or mainstream arguments against drinking any real strength until his own socio-economic situation is radically altered. Until that time he will probably go on drinking, just because drinking is or seems to be more pleasant than not drinking.*[61]

In its submission to the Kirby enquiry, the Tribal Counselling Services of the Four Bands saw detoxification centres as a way of breaking the cycle of drinking, law violations, guilty pleas, defaulting on fines, and imprisonment for its people. Tribal Counselling Services implied that the problem was one of proper socialization.

> *The Indian people are not skillful drinkers. Nor are they social drinkers. They drink much like guilty children, gulping it all down before somebody takes it away from them. When the bars were opened to the Indian people in 1966, no preparation for this very fundamental change was made. It caught the Indian people flat-footed. They indulged in alcohol and couldn't handle it.* [62]

At least two writers, Finkler (1975) and Hobart (1978), have examined the relationship between volume of liquor consumption and crime in the Northwest Territories. Finkler documents the history of access to alcohol at Frobisher Bay, the rise in legalized sales, and the move to greater consumption in private as opposed to public outlets. Private excessive drinking without adequate controls, he suggests, may be just as great a hazard as *"unrestrained drinking in licensed premises."*[63] Hobart, on the other hand, compared the volume of ethanol consumption in Mackenzie River Valley communities between 1962 and 1973 at a time when there was considerable corporate development directed at exploiting oil resources. He suggested that the explanation for those communities having higher offence rates was not only the increasing availability of liquor, but the high rates of employment and availability of liquor. Communities which were centres of transportation, communication, distribution (i.e., employment), and sources of liquor sales were also locations for the highest rates of

liquor and other offences.[64]

Harding has challenged Hobart's research for being *"uncritical of questions about the nature of economic development"*[65] and its impact upon Indigenous people. He has established alcohol-related arrest data which allows for the comparison of a non-Native community (Uranium City); a group of northern Saskatchewan Native communities on the frontier of corporate expansion in forestry, mining and transportation; and Native communities not on the frontier of corporate expansion but which have extensive fishing, hunting and trapping economies.

> *These findings strongly suggest that it was the dislocation of indigenous communities by corporate development that underlay increased alcohol-related arrests. More information, however, is needed to evaluate the development of underdevelopment and alcohol-related problems in northern Saskatchewan.*[66]

Harding's identification of the development of underdevelopment in northern Indigenous communities, the interrelationship of drug-related problems and the social and economic conditions created in the North, and the use of alcohol as one ready means of managing the contradictions of these conditions will begin to fill the theoretically-oriented research gap identified earlier by Verdun-Jones and Muirhead.

Sentencing Indigenous Offenders: Judicial Bias?

Imprisonment is not normally the first disposition selected by Canadian judges. The typical sanctions for those convicted of indictable, summary, or provincial statute offences are most frequently such penalties as fines, suspended sentences, or suspended sentences with probation, or some specific condition attached to probation. In 1979,

for example, it was estimated that in Canada only one in thirty persons convicted of summary or indictable offences was imprisoned as a form of sentence.[67] Despite this fact, the correctional statistics show that a disproportionate number of Indigenous people have always been imprisoned. In the search for an explanation the literature has focused on the question of differential sentencing of Indigenous people. Schmeiser's[68] study of sentencing data, mainly from Saskatchewan, found a pattern of more and shorter sentences for "natives," and less likelihood of receiving non-custodial sentences like probation in either rural or urban areas. The study by Bienvenue and Latif[69] used arrest data as opposed to institutional data and attempted to identify the severity of sentences given to Natives in a Winnipeg sample in 1969. While they found that Indigenous offenders have a slightly higher proportion of "lighter" sentences than non-Indigenous offenders, they were reluctant to assess the relative harshness of sentences without controlling for several relevant variables in their examination of the sentencing process.

Hartman and Muirhead's[70] study of 1975 admissions to British Columbia correctional programs, both prisons and probation, found distinct variations in sentencing. The choice of sanctions or dispositions varied by the geographic location of the offender. Probation was used differentially for Indigenous offenders in that proportionately fewer adults were given probation while the reverse was true for juveniles. Proportionately more Indigenous offenders were admitted to institutions for definite terms under two years, for

"indeterminate only" terms, and for default of fines. But proportionately longer terms were evident for Indigenous offenders admitted to both probation and prison for selected offences. While Indigenous women were admitted to institutions and to probation in proportions double those of non-Indigenous women, they were admitted for quite different offences.

Clearly, sentencing is a process influenced by legal as well as extra-legal variables. Given the discretionary power of judges and the apparent judicial practice of individualization of sentencing, differential sentencing outcomes would seem inevitable. But beyond the problems inherent in the practice of individualization of sentencing, studies of admission data raise important questions about possible disparity of sentences; that is, inequality of penalities as they are applied to identifiable groups of people who come into contact with the criminal justice system. Of course such inequalities may be evident in excessive leniency as well as excessive severity. The challenge to researchers is to establish whether any factors other than the nature and seriousness of the offence, and the number of past offences are creating biases in judicial decision-making in the case of Indigenous offenders.

Studies of the sentencing process in Canada, not necessarily focused upon Indigenous offenders, have explored at least three potential sources of bias in sentencing: the importance of pre-trial and pre-sentence decision-making; the problems of wide discretionary powers held by Canadian judges; and the subjective nature of the sentencing process, particularly judicial decision-making. The Law Reform Commission of

Canada, for example, acknowleged that different cultural and social conditions in this country may affect the different ways of dealing with crime, but these differential responses may also reflect different assumptions about the aims, purposes, and limitations of the criminal law and its processes. The implication is that non-judicial decision-makers may have different bases for exercising discretionary powers.

> *Traditionally, the focus in this area has been on sentencing by the courts. The place and nature of judicial sentences can, however, only be understood in the light of dispositions preceding trial as well as subsequent dispositions. There are many points of decision in the criminal process, some of which have had low visibility quite out of proportion to their importance. Before trial there are decisions by citizens to call the police, by the police to lay charges, by the prosecution to proceed and in which way; following sentencing, important decisions are made by probation officers, prison officials, and parole boards. There is often confusion both by individuals and agencies in this process concerning their roles and mutual expectations.*[71]

Other writers choose to focus upon the discretionary powers of judges. Jobson, for example, insists that the over-use of imprisonment for all offenders remains the central issue in sentencing policy and practice and he places the onus directly upon Canadian judges.

> *Canadian sentencing laws, as already indicated, leave the courts a very wide discretion in sentencing, and, with rare exceptions, judges are not required to impose sentences of imprisonment. If imprisonment is imposed it is because judges have developed practices of imposing prison terms rather than fines, probation, or discharges in certain types of cases. These practices, however, appear to be based largely on historical habit as reflected in previous cases. When subjected to the scrutiny of the social sciences, analysis within a framework of philosophy of law, or simple empirical observation, some of these sentencing practices appear suspect. In these circumstances past practice probably is not a sufficiently strong peg*

> *upon which to hang rational judicial decision-making. The exercise of sentencing power based only on past practice or unjustified assumptions may increasingly appear to be less judicial and more political.*[72]

Hagan also refers to the problem of discretion and sentencing on the racial composition of Canadian prisons and the impact of sentencing.

> *While modern systems of criminal justice are characteristically dependent on the temperate and impartial use of discretion by the judiciary, this is particularly the case in Canada. Legislation entrusts to presiding judges nearly complete freedom in the determination of minimum sentences, and a wide range of discretion in the establishment of maximum penalties (cf. Hogarth, 1971:4). In addition to this, there is some doubt regarding the basic principles (e.g., the role of precedents) to be used in the selection of sentence (Decore, 1964). Consequently, there is a heavy burden on the sentencing judge, with the implication that variation and disparity will follow.*[73]

Hogarth's[74] 1971 study of Ontario magistrates pointed out the marked disparity in sentencing practices for indictable offences, but he also established the importance of judicial attitudes and perceptions in sentencing. Hogarth's work, suggests Mohr, destroyed a legal fiction.

> *By differentiating facts, legal criteria and attitudes and perceptions of the decision-maker, he not only explained differences in sentencing patterns but showed the effect varying attitudes and perceptions had on specific outcomes. The proud principle of a government of laws and not of men turned largely into a legal fiction when it came to sentencing. The relationship between fact and law on the one hand and attitudes and perceptions of judges on the other showed itself as being less simple than it had been (and still is) assumed.*[75]

The importance of subjective judgments is underlined by the sentening model which Hogarth developed.

> *The model which emerges from the analysis is one that sees sentencing as a dynamic process in which the facts of the cases, the constraints arising out of the law and the social system and other features of the external world are interpreted, assimilated, and made sense of in ways compatible with the attributes of the magistrate concerned. In the process of judgment, the objective, external world is transformed into a subjective, definitional world. The results are sentencing decisions which are consistent with magistrates' definitions of the situations facing them.*[76]

In the literature pertaining to Indigenous people three aspects of sentencing have been looked at: the inappropriateness of sentences; the possibility of racial discrimination in sentencing; and, more frequently, the differential sentencing of Indigenous people who may arrive at the sentencing stage of the criminal justice system through the influence of discretionary decision-making of officials other than judges.

Among the many arguments advanced by the Native Counselling Services of Alberta for the introduction of Native Courtworkers was the question of inappropriate sentences.

> *The difficulties that arise when Native people become involved in the Criminal Justice System are felt by both the Native offenders and the Criminal Justice System personnel who must deal with them. Native offenders frequently receive sentences that are ultimately inappropriate and unfair. The Criminal Justice System personnel are forced to contribute to these unfair and inappropriate decisions because they have insufficient information to take any other action. There are documented cases of Native offenders who were sentenced for breaking into their own homes, and who were sentenced for the "theft" of a borrowed tool.*
>
> *The difficulties are rooted in cultural conflicts: a) a conflict between Native and non-Native cultures, and b) between the "poverty" class and the middle class.*[77]

Michalis and Badcock contrast Canada's complex, formalized justice system with a practice that would be more suitable for the majority of Native people living in small, homogenous communities. They emphasize the difference between the mainstream and "Native" legal traditional:

> *a) Under Native legal tradition, group authority was only brought to bear when an offender's behaviour jeopardized or undermined the social equilibrium of the community as a whole;*
>
> *b) Intervention, in the Native tradition, was aimed at the restoration of peace, as opposed to the delivery of justice;*
>
> *c) The standard form of Native traditional sanction was compensation for the victim, as opposed to punishment of the offender.*[78]

According to Michalis and Badcock, the Indigenous position on sentencing is that the main emphasis should be on community-based reconciliation, compensation, and rehabilitation. And strong input from Indigenous community leaders and Native Courtworkers in pre-sentence reports:

> *...would counteract any cultural bias and give the court deeper insight into the circumstances contributing to the case. Non-Native probation officers, it is suggested, concentrate on jobs, income, and education in their recommendations, where Natives would concentrate on individual and family strengths.*[79]

The argument is made that incarceration for non-payment should only be used when the accused has the means and refuses to pay or when all other enforcement methods fail. Indigenous groups in the Northwest Territories also expressed their concern that sentences in the lower justice of the peace courts were often *"harsher than those imposed by*

the higher courts."[80] They perceived the justice of the peace courts as being intent on obtaining money through fines, while the higher courts were perceived as too lenient and less concerned *"about the protection of the Native public when they refuse to remove dangerous offenders from the community."*[81]

Speaking to the problem of sentencing in the Northwest Territories, the Honorable C.F. Tallis, Justice of the Supreme Court, emphasizes the importance of non-custodial options.

> *When the common law was transplanted into Canada, it proved to be very flexible but native people, whether Inuit or Indian, had their own system of laws, tribunals, penalties, and in effect, their own justice system. Furthermore, such cultures did not have jails. This was a new concept introduced from the white men's world. It continues to be little understood by many of the elders in the Indian and Inuit communities. Consequently, a great deal of consideration is given to the possibility of imposing a non-custodial sentence with terms of probation or community service orders. With approximately 50 per cent of the population being 18 years or younger this is particularly important. In the case of youthful first offenders custodial sentences are generally avoided.*[82]

The question of differential sentencing is a preoccupation in much of the literature. Schmeiser (1974), Hartman and Muirhead (1975), and Bienvenue and Latif (1973) all note differences in the lengths of sentences imposed upon Indigenous people when compared to non-Indigenous offenders. Hagan began a series of studies in 1974 which focussed upon an examination of those extra-legal variables which may have led to differential sentencing of Indigenous people and hence to their over-representation in prison. Verdun-Jones and Muirhead[83] present an incisive summary of his important research. Hagan's first Canadian study established that in Alberta offenders with "native" backgrounds

were represented at least four times as often among the newly incarcerated than in the population in general. Based upon an analysis of inmate files he concluded,

> *...that although Indian and Metis offenders tend to receive shorter sentences, this pattern is largely explained by the group's disproportionate involvement in minor offences...the popular belief that Native offenders receive differentially lenient treatment from the courts is not supported by this phase of the analysis.*[84]

Indian and Metis offenders tended to receive smaller fines but, Hagan suggests,

> *...this is not a concession to disadvantaged circumstances or even an expression of paternalistic leniency, rather it is a product of the offenders' repetitious involvement in minor offences.*[85]

Although he also found that nearly two-thirds of Indian and Metis offenders who entered prison in the two-month period did so in default of fines, he linked this to their disproportionate involvement with alcohol abuse.

In a further study based upon the background characteristics of a sample of incarcerated offenders and the questionnaire responses of thirty-six Alberta judges who had sentenced these offenders, he tested the hypothesis that offender characteristics "interact" with judicial attitudes to produce disparities in sentencing. Among those judges who had an active concern for *"law and order"* there appeared to be no *"abuse of discretion"* or *"differential treatment of minorities."*[86] Offence seriousness and not race determined their sentencing decisions. Judges who were less concerned about *"law and order,"* however, appeared to use *"part of their discretion to provide lenient treatment"* to Indigenous offenders.[87]

Utilizing the offender data from his initial Alberta study and a sample of 507 questionnaires based upon probation officers' pre-sentence reports, Hagan subsequently examined the impact of urbanization and bureaucratization upon judicial sentencing.[88] Comparative sentencing patterns for Indigenous and non-Indigenous offenders in rural and urban communities were established. Probation officers in rural areas, he claims,

> *...sentence [sic] Indian and Metis offenders severely without the justification of correlated legal variables (i.e., prior record, offence seriousness, and number of charges). In addition, native offenders are more likely to be sent to jail in default of fine payments in rural than in urban jurisdictions.*[89]

In urban settings the trend was towards uniformity of sentences because of the more highly bureaucratized service and the presence of a prior record for an Indigenous person meant the assignment of more severe sentences than for non-Indigenous persons. The importance of the probation officer and his or her recommendation about sentence is identified very clearly in this study and raises the question of who really formulates the sentencing decision. If his/her advice is taken, the probation officer's perception of success on probation may influence the sentencing disposition. The importance of probation officers' recommendations around sentences and the bureaucratization of their decision-making to achieve the "equal treatment" found by Hagan in urban areas indicates an important area still not adequately explored in Canada—differential north-south and rural-urban justice for Indigenous offenders.

In this respect the research of LaPrairie and Griffiths with juveniles in Canada's "mid-belt north" gives some valuable leads.

They found Native juveniles over-represented at all stages of the criminal justice system. In the matter of disposition, however, they found that

> *...ethnicity was not a factor in the decision-making process and that the juvenile court responds in a similar fashion to both Natives and non-Natives....*[90]

LaPrairie and Griffiths indicate, in so far as juveniles are concerned, that there are significant socio-structural differences between Indigenous and non-Indigenous offenders.

> *The most significant aspects of this research carried out in a northern community were the findings relating to the socio-structural characteristics of native Indian and non-Native juveniles who were adjudicated delinquent. There was an expectation (from prior research with adults) that native Indian juveniles would be overrepresented in the criminal justice system and this was supported by this research. The extent of the structural disparities between native Indian delinquents and non-native deliquent counterparts was significant. It is already well documented that lower class youth as a group are over-represented in the juvenile justice system. In addition, the research illustrated that native Indian juvenile delinquents are far below their non-Native lower-class delinquent counterparts with respect to certain socio-structural measurements. Furthermore, the precourt inquiry (diversion) data revealed that Native juveniles become involved in the criminal justice system at a much earlier age than do non-Native juveniles. Clearly, a strong relationship may exist between this early involvement and a lack of structural controls or a lack of controls as perceived by criminal justice agents.*[91]

The only challenge in the literature to Hagan's findings is a study by Harrell[92] which examined pre-sentence reports in Edmonton and found that Native offenders convicted of serious offences received longer sentences than non-Natives. This, as he says, contrasts with Hagan's 1974 study which found the greatest difference between sentences for Native and non-Native offenders was for crimes of relatively minor legal seriousness.

Imprisonment of Fine Defaulters

The use of fines by judges is most frequent in response to minor crimes and alcohol-related offences. It is likely that most people are able to pay their fines and so avoid the backup sanction for default—jail. It is probable that the poor and Indigenous people bear the heaviest consequences of being unable or unwilling to pay fines.

There are some studies which indicate that fines levied against Natives are lower than for their non-Native counterparts. But, as Harding[93] points out in his 1978 study of impaired drivers in Saskatchewan, such smaller fines represent a larger portion of Native incomes than do fines levied against non-Natives. Even with these lower fines, a substantial portion of Indian impaired drivers in this study were unable to pay fines and were consequently jailed.

In a 1981 study of fine defaulters, then in Kenora District Jail, Jolly found the following situation:

> *The average incarcerated fine defaulter was serving 33 days of imprisonment for 3.5 offences in order to satisfy $120 worth of fines owing. All inmates were serving time for at least one liquor offence. Eighty-three per cent were recidivists, i.e., they had been convicted of previous offences during the past year.... Only one individual had previously had the opportunity to do community service as a condition of probation.... [and] all but two of them were of Native ancestry. Seventy-seven per cent were status Indians. Sixty-seven per cent were normally resident on a reserve.*[94]

Although his sample was much more selective than that employed by Schmeiser one decade earlier, the persistence of jailing in default of fines as a Canadian problem is astounding. In his 1974 report Schmeiser

drew similar conclusions:

> *1. Native offenders usually are involved in less serious crimes than non-Native offenders. Many are incarcerated for breaches of provincial and municipal statutes, particularly liquor and vehicles legislation.*
>
> *2. The average length of sentence served by a Native offender is less than that served by a non-Native offender.*
>
> *3. A large number of Native offenders are sent to jail for non-payment of fines. In 1970-71, 57.4% of all Natives admitted to Saskatchewan jails, constituting 1/3 of all admissions, were admitted for non-payment of fines, and the time spent constituted 18.1% of total days served by Natives.*[95]

Like Jolly, he condemns imprisonment for the non-payment of fines as

> *...an inconsistent and negative technique in the criminal process. It does not rehabilitate the offender.... It destroys the deterrent value of prison. It is very expensive, being the most costly form of supervision, and actually penalizes society for the wrongs of the offender. It also gives the appearance [sic] of being discriminatory against the poor.*[96]

But Jolly's judgment is that, as a contributing factor to fine default for Indigenous people, poverty is more real than apparent.

> *Jailing fine defaulters is an expensive and questionable use of public funds. For every dollar in unpaid fines which is satisfied through imprisonment, the Government of Ontario is spending $17. For every fine defaulter who is diverted from jail, the public might save up to $1,980. Poverty is a major contributing factor to fine default. Seventy-eight per cent of the sample reported that they did not have the money and could not have obtained the money to fully pay their fines. The income of a majority of the fine defaulters fell below the poverty line.*[97]

A study of admissions in Alberta done by Hagan (1974) and the Kirby review (1978)[98] confirm the connection between failure or inability to pay fines and the jailing of Indigenous people. Kirby cites the need

to account for the seasonal wage economy in making decisions about sentencing. Hagan's study identified racial disparity in the default of fines and subsequent imprisonment and, as Verdun-Jones and Muirhead point out, the relationship between *"race and the option of fine payment was at its strongest"*[99] when offenders were both previously convicted and intemperate. Verdun-Jones and Muirhead express some optimism that fine option programs may cut down on the default problem.

It is perhaps too early to make such a judgment if the experience in Ontario and Saskatchewan is any indication. Jolly[100] indicated in 1982 that little progress had been made in development of fine option regulations under the new Provincial Offences Act in Ontario which requires the consecutive (as opposed to concurrent) serving of terms in default. This legislation seems to fly in the face of the needs and social situations of most Indigenous people in northern Ontario. It may mean, as Jolly suggests, more time spent in jail unless special programs are developed in order to provide assistance at the court level as well as options to economic payments.

Jolly, with Seymour,[101] completed a further fine defaulters study at Kenora jail in 1983 partly to assess the impact of a new Provincial Offences Act. The Act was designed to relieve courts of minor highway traffic and liquor offences and to "regulate" this conduct through set monetary penalties rather than punishing the conduct as criminal. It permits police to proceed either by offence notice, which encourages out-of-court settlement by pre-determined fines, or by summons to court for trial and determination of penalty.

The evidence from this study, which compares defaulters who had pre-determined fines with court-sentenced offenders, confirms the very high rate of failure to respond to offence notices and high rates of fine default in liquor offences. Police in the town of Kenora proceeded by way of summons to court for primarily liquor offences twice as frequently as police elsewhere in the province, and Kenora courts used prison penalties for liquor offences three times as frequently as courts in the remainder of the province. Jolly and Seymour conclude that the major regulatory objective of the Act is being thwarted.

> *Although it is estimated that Native people constitute about 44 per cent of the total population in the District of Kenora, all of the sentenced offenders and 98 percent of the fine defaulters in the survey were of Native ancestry. The exceptional resort to imprisonment, which is the most severe sanction of the criminal justice system, for minor liquor offences such as public intoxication and its almost exclusive impact on the Native minority raise nagging questions about the use of the Provincial Offences Court and the wisdom of making public intoxication an offence.*[102]

In 1976 there was a review of Saskatchewan's Fine Option Program, begun in 1974 and addressed to the "disastrous implications" of jailing the poor (particularly Indigenous offenders) for non-payment of fines.[103] While the program was reaching some Indigenous offenders (80% of those incarcerated for non-payment of fines were of "Native" ancestry), the reviewers found that a large percentage of people incarcerated for default had not been given time to pay. It was also not known whether the existence of the program had any impact upon the practice of executing warrants for failure to pay. Lack of data on previous discretionary decision-making in this area made comparisons impossible. The reviewers argued that the fine structure be reconsidered; that offenders be given

the right to participate in fine options; and that referrals be made at the time of fine assessment, not when default becomes evident. In 1980 a further analysis of fine defaulters was undertaken in Saskatchewan but its results have not yet been published. It would be important and useful to know whether problems such as lack of time to pay persist, whether access to the program has improved, and whether the prticipation rate has changed for Indigenous people.

With respect to the use of fines for Indigenous peoples in his Alberta study, Hagan points to the irony of the supposedly humane use of fines rather than imprisonment by suggesting that it is the *"kind and usual"* manner in which fines are applied to this group that *"is most disadvantageous"* to them.[104]

Correctional Programs and Indigenous Offenders

Despite the long-standing concern about the over-representation of Indigenous offenders in Canadian prisons, surprisingly little research is reported on programs designed for Indigenous prisoners or on alternative community programs. Instead the literature concentrates on the description of problems, as perceived by Indigenous organizations and writers, as well as by non-Indigenous critics.

An often recurring issue is the cultural relevance of existing prison programs for Indigenous offenders. One critic suggests that prison programs designed and controlled by the non-Indigenous are "inherently discriminatory" and when these programs fail to address cultural differences they become a form of institutionalized racism.[105] As in other

components of the criminal justice system, the discretionary powers of correctional officials is another major issue. It is suggested that Indigenous offenders may not have equal access to some prison programs, to early release on parole and temporary absence, and to the standard option to prison, supervised probation. While a portion of the literature makes proposals about culturally relevant options, it is suggested that these will not be effective without taking into account the location of Indigenous offenders, and the nature of Indigenous employment patterns and opportunities, as well as the socio-economic circumstances of Indigenous offenders, all of which have to do with equality and distribution.

As in the previous chapters on policing and legal services a number of themes are repeated in the solutions offered to these problems. The indigenization of correctional staff, in whole or in part, is a common proposal. As an alternative or secondary solution, the cross-cultural education of non-Indigenous staff is proposed to sensitize them to Indigenous differences and needs. A third solution, frequently offered but rarely developed, is for correctional programs to be designed, staffed and controlled by Indigenous groups.

Indigenous organizations in Canada have identified a range of suggestions for change in prison and other correctional programs. The *Metis and Non-Status Indian: Crime and Justice Commission* (1977), for example, proposed a strengthening of Native Brotherhoods and Sisterhoods and the hiring of Native staff, including Native liaison staff. They drew attention to a disproportionately low opportunity for parole and other forms of release, as well as flaws in grievance procedures,

especially the lack of legal representation and parole advocacy and assistance.[107]

In their 1979 research Michalis and Badcock[107] identified a specific series of issues in corrections. These issues dealt with proposals for staffing, staff training, the inadequacy of services and facilities for Indigenous parolees, and inappropriate assessment criteria for release on parole. In a similar way, the authors found that Indigenous groups considered certain prison rules and procedures to be inappropriate. Particularly unsatisfactory were family visiting arrangements, barriers to institutional transfers and lack of a Native ombudsman. Michalis and Badcock called for better and more relevant vocational and educational opportunities in prisons and fewer restrictions on self-help programs provided by Indigenous inmates. As well, they identified the lack of access to probation and the lack of emphasis upon restitution in the community as issues of relevance to Indigenous offenders.

One of the documents from the National Conference on Native Peoples and the Criminal Justice System in 1975 which influenced Michalis and Badcock's analysis illustrates the thinking of the Inuit delegation on the nature of correctional institutions.

> *The correctional institutions should emulate the one in Frobisher Bay which has a name which means 'a place to get help.' The main characteristics of the Frobisher insitution [sic] are its openness, its predominatly Inuit staff and its efforts to relate with members on a fully human basis and to reflect Inuit values in its programs. e.g., members and workers of the centre frequently go on the land together hunting.*[108]

Native Counselling Services of Albert (NCSA), one of the major Indigenous service organizations to respond to the unique needs of its people, sets out its views of those needs.

> *NCSA operates from the premise that Native pople have special difficulties in dealing with the criminal and correctional systems that are not experienced by Non-native offenders and inmates. These may include: a language barrier, a lack of understanding of legal terminology, a hesitation to speak up for oneself, cultural differences and other factors.*[109]

Since the 1975 Edmonton conference Indigenous organizations have developed different responses to the recommendations of that meeting. Two organizations illustrate both the nature of services considered essential for Indigenous people as well as the capacity of those organizations to conduct their own research. NCSA, for example, has developed twelve different programs along with a capacity to review, analyze, evaluate, and plan changes in program emphasis. It is their view that such programs as parole, probation, diversion, fine options, liaison officer programs, and special correctional facilities, all run by themselves, have been "partly responsible" for a decrease in Indigenous prison admissions in Alberta.[110] They have made assessments of such correctional facilities as their Beaver Lake Camp[111] in terms of staff stability, institutional costs, inmate profiles and work activity. Their High Level Diversion Project, despite the difficulties of comparing its relative effectiveness to other community-based options, was considered to be excellent prototype for the development of new programs. While the NCSA Project was underutilized, it did demonstrate that there were options to prisons for a predominantly Indigenous offender

group. It also demonstrated to project leaders the pressures to conform to the formal justice system. Without greater administrative and policy control at the local community level, they argue, such projects will fail to respond to community need.[112]

Although more modest in its development of services for Indigenous offenders, the Ontario Native Council on Justice has been in existence for six years.[113] It brings together representatives of eight Native organizations to provide a basic research capacity which informs its policy recommendations to governments and which has influenced the development of such correctionally-oriented programs as probation and parole, Native liaison projects, and community services projects. Its research capacity has enabled it to establish data on fine defaulters in Kenora,[114] to influence the nature of fine option programs which involve Indigenous offenders in Ontario, and to make them relevant in cultural as well as in socio-economic terms.

Dubec's[115] research for the Ontario Native Women's Association (1982) attempts a resource needs assessment for Native women involved in the criminal justice system. Her data are derived from sampling the views of Native women in custody in Ontario and from contact and interviews with community support groups and agencies in that province. The study emphasizes the minority position of Native women inmates in overall inmate populations and the fact that previous research has overlooked their needs and concerns.

While Native women inmates participate in institutional maintenance, beadwork, cards, or watching television, their real

priorities would be institutional programs that deal with alcohol problems, employment training opportunities, recreation programs and a wide range of rehabilitation services including residential and group home facilities. Community support and service agencies, on the other hand, stressed the need for residential services, family support and planning services, as well as drug and alcohol prevention, education, and treatment programs. The recommendations which flow from the study very clearly emphasize the pressing need to develop options to prison as a way of dealing with Native women in the sample, over half of whom had been incarcerated for liquor-related offences. Over half of that sample had been jailed up to three times previously and a similar number had been arrested originally at between 14 and 17 years.

Institutional Programs

In his analysis of correctional policy for "native offenders," Reasons argues for a movement away from an order/assimilationist approach to a conflict/pluralist model. He suggests that the "allowance" of Native Brotherhood and Sisterhood organizations in prisons is a beginning in addressing Native issues in corrections,[116] particularly that of equal opportunity.

> *While egalitarian principles are often used to preclude different treatment for native offenders, cultural differences necessitate different habilitative programs and services for native offenders in order to provide equal opportunities. Therefore, the rules and regulations regarding probation, parole, and correctional institutions must be analyzed for*

> *possible institutionalized racism. Within the context of the larger Canadian society, the order/assimilationist model is increasingly becoming inappropriate. Given the facts of the movement for native cultural revitalization, emergence of red power and the beginning of the establishment of minimum civil and human rights for prisoners, a conflict/pluralist model is providing a viable alternative to the order/assimilationist approach. The implications of maintaining order/assimilationist policies for native inmates within the context of events external to corrections are increased tension and conflict and continued failure in attempts at habilitation.*[117]

But there is no unanimity among non-Indigenous commentators. Lautt, for example, calls for a more thorough study of the long-term effects of Native organizations within corrections.

> *Although they may serve as rehabilitative vehicles for a few native individuals searching for a source of self-esteem, they also serve the institution by maintaining order, and they serve the white community by providing native-supported structures and policies of segregation.*
>
> *...it is abundantly clear that the straightforward recommendation that natives work with natives in provision of justice services is barely the 'tip of the iceberg' of our knowledge and understanding.*[118]

While Finkler has recently proposed a policy of *"culturally relevant institutional programs"*[119] as opposed to southern-based institutional strategies, he has recognized elsewhere that traditional or cultural components in institutional programs may not be equally valuable to a younger and different group of Inuit offenders who are being admitted to the institution in the Eastern Arctic.[120]

One Indigenous service organization (NCSA) proposes the staffing of institutions in direct proportion to the number of Natives

in the inmate population and that Native Liaison Officers be allowed as sole supervisors of certain inmate activities (AA meetings, mini-socials, and cultural awareness programs). They do not, however, suggest that Indigenous inmates be forced to participate in Native programming.[121]

> *In the case of Native Inmates, they should be given the choice of whether or not to take part in Native programming—not all Native people are interested in Native culture.*[122]

That organization is more concerned with assuring *"fair and equitable treatment for native people"*[123] and in this respect questions the validity of psychological tests (particularly the MMPI) used on Indigenous inmates to arrive at important discretionary decisions.[124]

It has been apparent for some time that Indigenous inmates were not involved in many of the programs in Canada's penitentiaries.[125] The implication of a more recent submission by NCSA[126] is that involvement depends upon the development of specific programs, many of them modified to meet Indigenous inmate needs.

Although it does not focus entirely on institutional issues and policies, the 1981 Newby report examines the need for a co-ordinated, coherent "Special Policy for Natives in Correction"[127] within the Correctional Services of Canada (CSC). The report deals with the implications of policy options as well as criticizes the current policy-making process.

> *Presently, policy for Natives within CSC is dispersed and sporadic, with an overwhelming orientation towards operational programming needs, and without proper capacity for development of a co-ordinated overall approach. As a result, policy emerges in a reaction to specific issues fashion, rather than as a consistent part of proactive movement towards established objectives. A major theme of this report has been to identify the policy environment in which decisions about natives must be made, and to highlight the difficulties of policy development posed by the current situation.*
>
> *The report also identifies a number of substantive problem areas requiring attention, both in the institutional and after care context. A major policy theme underlying these however must be clarified. This is an issue which CSC has yet to come to grips with; the idea that equal (meaning similar) treatment of all offenders regardless of whether they belong to the majority dominant culture (white, urban, southern) or not, may result in de acto [sic] discrimination/disadvantage for a minority group with different needs and affiliations. Although CSC has recognized the special nature of Native needs in many programming areas, it has not gone far enough in rationalizing this particular concept as underlying the problems experienced in implementing these.*[128]

While it was designed to inform policy debate within the Ministry and specifically in the CSC, it offered suggested solutions in four of six substantive areas it considered to be priorities for policy development.

In the issue of Employment of Natives, for example, Newby suggests a pilot project to turn over one institution to a majority of Native offenders and staff with increased input from Native service agencies and Native community development programs.[129] With respect to Special Prisons; that is, separate prisons for Natives, she suggests the expanded use of "adjunct" or wilderness

facilities, as well as the development of some institutions with a majority of Native inmates.[130] Her suggestions to deal with the "unintentionally discriminatory" impact of Conditional Release policies involve both research into release criteria and the reasons for disadvantages experienced by Natives, and the greater use of Native-run and Native-reserve based community support facilities. As to Institutional Programs, she calls for the strengthening of Native Brotherhoods and Sisterhoods as rehabilitative vehicles and the expansion and rationalization of Native Liaison worker functions. She directs attention to special needs (spiritual, cultural, and linguistic) and notes that lack of system sensitivity and lack of awareness by staff of cultural needs remains a problem.[131]

While Newby considers that a decade of government programming in the criminal justice field has done little to change the situation for Natives, she argues that "certain factors" are within correctional control and new policies can assist in reducing Native over-representation in prisons.[132]

Probation

As already indicated, throughout the admission studies completed in Canada (Schmeiser, 1974; Hartman and Muirhead, 1975) there is evidence that the use of probation is disproportionately less frequent for Indigenous offenders. In order to achieve equal opportunity for the Indian offender delegates to the Edmonton Conference called for specialized units within probation services to

work with Indigenous offenders and the indigenization of probation staff.[133] While several probation projects designed for Indigenous offenders operate in Canada only one systematic study appears to have been completed.

Heinemann completed an evaluation of the Saskatchewan Indian Probation Project in 1978.[134] This was a co-operative effort begun in the province in 1975 between the Department of Social Services and the Federation of Saskatchewan Indians. The project proved, according to Heinemann, that *"good quality probation services"*[135] utilizing Indian people in probation officer roles could be provided to Indian offenders living on reserves. It established evidence that those services had not been available previously on a consistent and continuous basis to Indian communities, that communication problems had interfered with the delivery of services to reserves, and that the quality of services to those areas had been inferior. The project, however, did not accomplish a number of very demanding roles which were linked to community development and prevention. Both of those objectives were considered as unrealistic given the length of the project and its resources. What was also apparent was that the probation services provided to reserve areas did not develop in non-traditional and innovative ways as had been hoped. While the use of and access to probation increased on the reserves, and adequate standards were maintained, the service and the methods were no different than those delivered elsewhere in the province to non-Indigenous probationers.

Parole

Much the same kind of concern is expressed about the discriminatory aspects of parole and parole-related decision-making. In 1971 McCaskill[136] had documented a number of problems for Indigenous people in Stony Mountain Penitentiary, Manitoba. Inmates of Indigenous origin considered parole rules inflexible and community services inadequate and lacking the involvement of Indian and Metis communities. Michalis and Badcock[137] expressed similar views, including their concern about inapproriate assessment criteria for parole eligibility.

One in-house study of parole granting and denial rates for Indigenous and non-Indigenous prisoners in the prairie region of the National Parole Board was conducted in 1978.[138] It is currently being repeated although findings are not yet available for review. The 1978 study confirmed the assumption that Indigenous inmates are more unfamiliar with parole regulations and are less confident about being granted parole than their non-Indigenous counterparts. They are also denied parole more frequently and have a higher failure rate when granted parole.

Comparative data on Native and non-Native federal inmates (1976 to 1980) in the Canfield and Drinnan report reinforce the differential in parole decision-making. Natives in that study were admitted to penitentiaries more frequently than non-natives for technical violations of both parole and mandatory supervision agreements, not for further offences.[139] Release data also reveal

substantial disparities. Regardless of security classification, length of sentence, nature of offence or prior penitentiary history, Natives were consistently more likely than non-Natives to be released on mandatory supervision than on parole.[140] One in eight Natives were released on parole compared to one in three non-Natives.[141]

A more thorough and sophisticated study was also completed in Alberta in 1978 on two different samples of 1972 potential parolees. Demers'[142] study is an empirical examination of the selection and supervision phases of parole decision-making. Path analysis techniques were used to evaluate the discrimination hypothesis, i.e., that the discretionary power exercised by parole officials results in prejudicial decision-making. A parole selection sample as well as a parole termination sample were examined.

This study was not able to establish a general claim to prejudicial decision-making by parole officials. Nor was there evidence of prejudicial treatment in the supervisory practices of parole. However, parole officers did differentiate between racial groups in the selection and weighing of information which form the basis of their evaluations around parole decisions.

Parole field officers have direct access to information not available to Parole Board members. They are, therefore, in a position to select and control the flow of information received by the ultimate decision-makers, the board members. The organization of the decision-making process makes busy Board members dependent upon the advice, information selection, and the discretionary powers

of parole officers. As Demers points out, this introduces "a channel of extralegal influence in the process."[143]

> *Notwithstanding the general lack of corroboration for the hypothesis of legal bias, the analysis does reveal a significant relationship between race and parole system decision-making. Although race exerts no direct impact on board decisions in the selection process, Indian and metis candidates are less likely to receive favourable officer recommendations than their white counterparts. In fact, the analysis indicates that parole officers differentiate between racial groups in selecting and weighing information when formulating parole evaluations. [Whites: employment index, previous parole, drug usage; Natives: previous parole, institution, alcohol problem (p.138)] Thus, it would appear that officer assessments can indirectly produce racial inequalities with reference to parole selection.*
>
> *Moreover, the analysis reveals that natives are more likely to have their paroles terminated by revocation than whites. In fact,...natives paroled from federal institutions have the greatest probability of revocation....Federal inmates receive longer sentences than their provincial counterparts and, as a rule, their parole periods will also be lengthier. Consequently, they run the greatest risk of eventual exposure to situations which could induce parole violations and result in revocation. In part, this accounts for the high rate of parole failure among natives paroled from federal prisons vis-a-vis those released from provincial institutions. Although 65% of the natives paroled from provincial institutions were able to complete their paroles successfully, only 7% of their federal counterparts were terminated by reason of expiry. By comparison, 66% of the white, provincial parolees completed their paroles successfully whereas 29% of the whites released from federal prisons were terminated by parole expiry. Thus, the impact of "time at risk" [the institutional variable] would appear to be restricted to federal cases, as the analysis reveals no significant racial differences in parole outcome at the provincial level.*

> *In addition, it would appear that incarceration in a federal prison exerts a particularly pernicious influence on native offenders. Whereas 71% of the whites paroled from federal institutions were eventually revoked, fully 93% of the natives released from federal prisons were reincarcerated by reason of revocation. Thus, it may be that incarceration in a federal penitentiary creates problems of social reintegration that are particularly acute for native parolees.*[144]

Alternative Dispositions and Fine Options

Monetary penalties, as already indicated, are frequently used by Canadian judges. It has been estimated[145] that fines are utilized in eighty per cent of summary convictions and in thirty per cent of the convictions for generally more serious indictable offences. Obviously the use of fines will vary geographically and by judicial decision-makers. Without court data it is impossible to be precise about patterns and proportions of fines for Indigenous offenders. Despite these limitations, several studies noted in the literature have established that monetary penalties place a very heavy burden on Indigenous peoples who are at a serious disadvantage socially and economically. Admissions to prisons for fine defaulters is a well documented policy issue in Canada, especially for Indigenous offenders. The Fine Option initiatives of Saskatchewan and subsequently other jurisdictions were the first alternatives specifically designed to deal with this obvious problem.

The research in this area, particularly by the Review Committee[146] in Saskatchewan and by Jolly[147] is excellent in its

identification of fine options as a method of reducing the admission to prisons of Indigenous fine defaulters. Both studies point to the need for a closer examination of judicial practice and decision-making, access to the fine options program, and the supportive and advocacy services essential to wider and more effective application of the concept. The study of Native inmates in Ontario by Birkenmayer and Jolly[148] clearly establishes a Native inmate preference for community service or restitution options to jail, as well as for prevention programs offered on reserves. As already indicated, the 1983 Jolly and Seymour[149] study identifies a number of specific issues in fine option practices along with alternate reforms which could address the broad issue of relying on prison to deal with minor offences, especially liquor-related offences.

There is very little documented research on more recent options such as diversion and pre-trial programs, or the variety of reparative sanctions which have been discussed in academic and policy-making forums. What seems to be missing even within these discussions is either the need to develop such programs that do not in the end draw more Indigenous people into prisons, or an acknowledgement of the socio-political contexts in which Indigenous people come into conflict with the law.

We are left with Jolly's admonition which should be taken seriously by planners and researchers, especially those who seek some form of "quick fix" in law, but have no assurance of resources to bring real alternatives to the Indigenous peoples who are most

seriously dislocated.

> *The band-aid, piece-meal approach—which is characterized by the Ontario Native Council on Justice itself; several native legal clinics; a few native inmate liaison projects; a couple of community service order projects; a native courtworker program; some native justices of the peace, probation and parole officers, and probation and aftercare officers; and a native special constable program—may only be serving to keep the lid on a bubbling cauldron of complicated and inter-related social, economic, political and cultural problems.*[150]

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CHAPTER 5: INDIGENOUS PEOPLE AND THE CANADIAN CRIMINAL JUSTICE SYSTEM: IMPLICATIONS FOR RESEARCH AND POLICY

This final chapter summarizes the research policy and implications gleaned from the literature review. Our contract was to:

> *...provide a critical assessment of the state of research relating to Natives and justice with regard to its completeness, quality, and relevance....[and] a chapter setting out the implications for further research and for the policies and operations of the criminal justice system and of the Minister, as foreseen by the principal investigator (to the extent that one can reasonably expect that he will be aware of these policies and operations)....*

First we summarize some generalizations about the limitations of the available research literature. Secondly, this chapter draws conclusions about the research and policy implications of the material under review. Finally, we suggest some principles to make research more relevant to the needs of Indigenous peoples.

I. Limitations of the Existing Research

Carol Pitcher LaPrairie and Alex Himmelfarb[1] have discussed different types of research directed at explaining the over-representation of Indigenous peoples in the criminal justice system. In particular, they have focussed upon research approaches which explain over-representation in terms of some kind of "disparity."

Most of the research literature available discusses the issue in terms of two categories: either a "blaming the victim" or a "discrimination" explanation. A minority of these would sometimes explicitly, most implicitly, hold that:

> *...the explanation [for over-representation] must be found in the offenders' behaviour, specifically that Native people are disproportionate in their criminal behaviour and/or commit the serious types of crimes that the Courts deal with most harshly.*[2]

We would call this the "blaming the victim" explanation.

The dominant explanation emerging from the research literature is the discrimination explanation which:

> *...focuses on the criminal justice system and how its personnel and agents act with intentional or unintentional discrimination. The behaviour of these agents... makes it more likely that Native people will be designated as deviant, indeed criminal, and will receive the harshest sanctions.*[3]

The "blaming the victim" explanatory research category examines differences between groups of people, e.g., Natives and non-Natives, rather than examining the criminal justice system itself. Reform policies are assimilationist and suggest such measures as resocialization and job training. The "discrimination" explanation's underlying orientation is integrationist rather than overtly assimilationist. Reform policies advocate the indigenization of personnel in the criminal justice system, i.e., increased buffers between the system and Indigenous people such as courtworkers, Indigenous lawyers, increased legal aid, Indigenous justices of the peace, Indigenous special constables, tribal courts, and correctional facilities and services controlled by and culturally appropriate for Indigenous inmates. Where the system is not indigenized, cross-cultural sensitization of criminal justice personnel is frequently advanced as a means of reducing the discriminatory exercise of discretion.

The analytical framework used in our review highlighted the limitations of these two approaches. Instead we adopted a structural-conflict perspective which states that underdevelopment (and therefore social inequality) is central to the over-representation of Indigenous people in the Canadian criminal justice system.

> *In its extreme position, the criminal justice system is seen as supportive of inequalities through the reproduction of social order. In this latter view, neither the Natives nor the agents of the criminal justice system are perceived as villians [sic]. All are constrained by the same social structure, the sames laws of inequality.*[4]

We would qualify this description for our purposes since it ignores power differentials and therefore allows all parties, corporate and individual, an excessively determinist passivity in their responses.

The reform proposals which emanate from this approach are directed towards the achievement of autonomy and social justice for Indigenous people. We would therefore argue that further research should be informed by contemporary social policy literature and research which examines the role of the state in mediating the dysfunctions which flow from forms of social organization such as patriarchy and capitalism. For example, this literature analyzes and predicts the state's response to fiscal crises, and examines the need to perpetuate a patriarchal sexual division of labour, and the underdevelopment process. Of particular relevance to the subject at hand is the government's function to coerce conformity among oppressed minorities through the maintenance of "law and order."

The absence of such contextual, multi-disciplinary understand-

ings are particular shortcomings of the literature reviewed. Socio-economic quantitative data is abundant but is never used to explain the social origins of crime. Surely remedial social policies can neither be conceived nor implemented without the appreciation of historical and economic processes such as underdevelopment.

For example, because of the lack of underdevelopment literature, there is a gap which does not allow us to compare urban and rural, reserve and off-reserve, and northern and southern situations. Likewise, the absence of analysis of patriarchy means that there is a lack of research literature, including comparative research literature, relating to the particular problems of Indigenous juveniles and females who bear the brunt of social change, e.g., unemployment, and who are marginal to mainstream social institutions such as the job market.

A related limitation of the "blaming the victim" research available for review is the lack of comparative research on Indigenous and non-Indigenous people, particularly in terms of age, gender, geographic location, and socio-economic indicators.

II. Research and Policy Implications

Re: Chapter 2 - Law Enforcement and Indigenous Peoples

The Law Itself

Law enforcement personnel are charged with the enforcement of inherently discriminatory laws. Perhaps the most important facet of the relationship between Indigenous people and substantive law is the

absence of recognition of traditional or customary law ways. In Canada a statist tradition prevails which does not recognize a plurality of legal systems. This jurisprudence is explicable given the historical colonial evolution of the Canadian state. It also derives constitutional legitimization from the convention of parliamentary sovereignty inherent in a Westminister-model constitutional monarchy, albeit of a federal nature. Harold Finkler suggests that an option for improving the position of the Inuit in the Northwest Territories may be in a:

> *...new correctional system based on the traditional normative structure and system of sanction....[and the] codification of the Inuit's individualized, flexible, tolerant, and pragmatic approach to the treatment of offenders....*[5]

This reform proposal requires, for example, that a far greater autonomy be granted to Inuit people concerning the whole area of socio-legal control. Radical change in enforcement, adjudication and sanctioned mechanisms must be accompanied by a change in the normative rules employed.

Research is required to find out how widespread the recognition of traditional law ways still is among communities. It is important to also beware of an exclusively archaelogical approach. We may also have to derive a code of contemporary Indigenous common law by inductive methods. What kind of rules now govern child welfare, family breakdown, property misappropriation and the regulation and reallocation of numerous other obligations in the civil and criminal law realm? Research of this kind in both urban and rural or remote areas is required

if the rhetoric of self-determination and self-government is to be realized. The law itself is highly ethnocentric as are the sanctions it enables and the means of adjudication. The Canada-wide application of a single criminal code is the antithesis of the rhetoric of the Canadian plural mosaic. It is, therefore, little wonder that the law is enforced discriminatorily.

Law Enforcement

Most of the "discrimination" explanation literature concentrates on law enforcement. For example, it is frequently observed that laws penalizing vagrancy and public drunkenness are discriminatorily enforced with respect to the urban poor of whom Indigenous people make up a high proportion. Such laws also need to be subjected to scrutiny from at least two further vantage points: (1) What social interest is to be protected by the enforcement of such laws; and (2) What is the socio-economic context producing vagrancy and public drunkenness?

Existing research is both limited and lacking in comparative and contextual data. We feel such data is necessary to support policy formulation whether the fields are law reform, social services, and health care provision, or policing practices. It is our "hunch" that municipalities and other governmental planning and service delivery agencies are guilty of using policing services as a coercive substitute for the adequate provision of residential, recreational, and educational facilities, and for the employment opportunities which are required to accommodate the significant and increasingly permanent urban migration

of Indigenous people. This can occur when law enforcement policy is developed out of context or in a vacuum. This "hunch" is based on the fact that the data reviewed reveals that where a large proportion of Indigenous people are to be found the per capita investment in policing is also large. Comparative research on the share of health, social, educational and economic dollars expended on Indigenous peoples should be conducted.

The Dimensions of Law Enforcement

The data on per capita expenditures on policing by region leads us to hypothisize that policing itself is criminogenic; that it leads to the overinvolvement of Indigenous people with the criminal process. A question to be explored is whether less policing, and more or equivalent expenditures on other services, would lead to less involvement with the criminal process.

Assumptions in the Problem-Definition/Solution Model

Rigorous, comparative research is required to examine the nature, causes and results of prejudice held by the police, public, and other decision-makers in exercising their discretionary powers over Indigenous people, particularly in the urban environment. The assumption that cross-cultural education has an amelorative impact on prejudice requires testing. For example, it would be useful to know what forms this educational process takes and for whom it is provided (i.e., novices or veterans); if its effect is enhanced or eroded by the organizational

ethos in which officers are professionally socialized at work; and whether institutionalized racism is condoned or disciplinary action is taken against police officers.

The assumption that the indigenization of policing is beneficial or sufficiently beneficial in its existing form, i.e., tribal police or special constables, requires further research. Much of the literature in this area is contradictory.

If these gaps in the research are filled it may be possible to formulate policies with respect to law enforcement practices involving Indigenous people. Value-judgments will, nevertheless, have to be made, but these should not dominate so as to predispose research outcomes.

Selection of Police

Research literature does not appear to have used the "attitudes toward and experience of" Indigenous people as criteria for the selection of regular police personnel. Some research literature, however, suggests that personnel selected for Indigenous policing are of a class and educational level which impairs their ability to police effectively. They over-identify with "white" attitudes. Research and policy needs to address these issues as well as the levels of stress encountered by Indigenous officers who police Indigenous people.

Policing Methods

Research is required to assess the types of intervention services which reserve and rural Indigenous communities require. The division of labour between law enforcement, social service, and health care

services requires major re-evaluation. At present the police appear to be substitutes for other services. The crime control image of the police and their training and mandate are such that this situation may be inappropriate and unsatisfactory to all citizens for whom police are their only 24-hour-a-day service.

Indigenization of Policing and Other Options

Indigenous peoples are now asking for much greater autonomy in the control of all services required in their communities. Comparisons of the value to communities of special constables versus RCMP versus autonomous police forces are required. The studies done to date reveal that federally-sponsored government studies favour the special constable system (option 3(b)) while Indigenous peoples' organizations have commissioned research favouring more autonomous policing. An independent examination of the competing models and interest groups is required to collect and evaluate the data more objectively.

Policy studies and research are required to examine the reasons for success or failure of affirmative recruitment programs in urban police forces. Furthermore, means other than policing which are controlled by local communities require exploration. If programs and policies to reduce the tension between Indigenous people and police are to succeed, then macro- and micro-level policy and program changes are necessary. These might include ombudspeople travelling with patrol cars; independent "ghetto grievance" mechanisms; and credible, independent police-citizen complaints procedures. There is virtually no

research on the Canadian experience with respect to these types of alternatives.

Re: Chapter 3 - Indigenous Peoples in the Criminal Court Process

This chapter dealt with the research on legal services, Native courtworkers, affirmative legal education, and the indigenization of the courts. Research literature was not extensive except on Native courtworker programs. There appears to be no research on the prosecution or defense processes and biases which may exist there. This, therefore, is an urgent research project which should employ a comparative methodology.

Problem Definition/Solution Model

The discrimination explanation of over-representation assumes that the over-involvement of Indigenous people with the criminal justice system can be reduced or its harmful effects mitigated by inter alia:
a) Improved access to legal services and Native courtworker programs;
b) Public legal education for Indigenous people to demystify the court process through increasing their knowledge and use of their rights; and
c) Indigenization of the legal profession, judges and courts to eliminate prejudice and promote sensitivity to the plight of Indigenous people.

Each of these assumptions requires research and policy analysis and should not be a taken-for-granted strategy for "solving" the problem. Attempts to answer specific questions in these areas will require both research and the funding of pilot projects to evaluate the viability

of particular concepts in operation. We would recommend this latter course of action be embarked upon only in collaboration with Indigenous people.

Legal Services

Evaluative research has yet to yield a satisfactory model for delivering legal services for Indigenous peoples. Further pilot projects and research studies are required to fill this gap. It appears that both services offering to handle individual cases and those constructed around community organizing or development are required.

Indigenization of Lawyers and Courts

Research into the Native Law Centre's compensatory education program concluded that it was a useful program in that it encouraged Indigenous people to pursue legal education. It was moot as to whether the program actually enhanced their success in law school. There has been some research into the means of assisting Indigenous people to enhance and realize heightened aspirations in social services and health care, for example, but research in all areas of the administration of justice has not been a priority and, for that reason, seems urgently needed.

The development of tribal courts has received little attention in Canada and only one study examined Native justices of the peace. Issues of jurisdiction, personnel, and political independence require further attention. A clear understanding of the tension between western concepts of judicial "independence," i.e., lack of bias, and the desire

of Indigenous peoples to be their own judges requires much more research. The U.S. literature is contradictory on this issue.

Native Courtworkers

Native courtworker programs represent a form of Indigenous service for which there is no non-Native equivalent except inasmuch as non-Natives would employ lawyers to perform the variety of tasks expected of Native courtworkers. Further research is required into the educational needs, roles and perceptions of users and managers of courtworker programs. In particular, no data is available on the function and value of friendship centres in the context of this service. We would recommend the replication of the Co-West and Ontario Native Council reviews of courtworker programs as the first step towards addressing some of the above questions.

Re: Chapter 4 - Sentencing Indigenous Peoples, Over-Representation in Prisons and Alternative Dispositions

In this chapter we looked at explanations for the over-representation of Indigenous people in the correctional system. The correctional system has been the focal point for much of the research on the subject of over-involvement of Indigenous peoples with the Canadian criminal justice system. Consequently, this chapter rounds out a number of explanations only alluded to in other chapters of this review.

A common methodology has been to work backwards from data revealing the over-representation of Indigenous people in jail. This has led researchers to focus on sentencing, alcohol, socio-economic conditions,

and prison programs. The result has been to develop an extremely eclectic understanding of the specific dimensions and aetiology of over-representation.

The Influence of Non-Judicial Officials on Sentencing

There is little Canadian literature on the influence which police, prosecutors, defence counsel, and probation officers have on sentencing decisions. While some recent studies address some of these questions for the population as a whole, this gap in the literature is almost a total one with respect to the sentencing of Indigenous people. Comparative urban/rural, non-Indigenous/Indigenous research, as well as basic research on the "input" of police, lawyers, and probation officers is required before a rudimentary grasp of the factors influencing the encounters of Indigenous persons with the criminal justice system can be taken. In addition to such data, there is a major lack of knowledge on the comparative use of official dispositions for Indigenous and non-Indigenous offenders. That gap could be closed by more adequate data gathered at the court processing stage which would allow for a rural/urban, north/south examination of comparative justice.

We would hypothesize that custodial sentences are more common for Indigenous people because of a lack of legal representation, inadequate access to good quality community resources, and the poor socio-economic conditions in which they live. Hence, for example, probation pre-sentencing reports on sensitive personal "problems," community supports, questions of stability, and "risk" to communities tend not

to present a favourable profile for Indigenous offenders for non-custodial sentences or parole.

Another piece of basic research is needed in order to have an inventory of appropriate resources in the community available as alternatives to custodial sentences. We .ould suggest that these are woefully inadequate, particularly in rural areas. This fact alone will have a major impact on sentencing outcomes. In view of the impending implementation of the Young Offenders Act, it is particularly important to document and assess the adequacy of facilities and services for Indigenous youth as well as programs which could provide "alternative measures" for youth now held accountable under its provisions. We also need to know the specific effects the Young Offenders Act may have on Indigenous youth as compared to their situation under the Juvenile Delinquents Act.

Drugs (Including Alcohol), Crime and Underdevelopment

The Canadian research literature contains almost no systematic data relating crime rates, drug abuse, and socio-economic conditions. Yet each subject has received considerable attention as a distinct area of research. Some research argues, for example, that alcohol and drug abuse may be a "normal" means for the "management of the contradictions" arising from underdevelopment, and there is a growing literature which portrays alcohol and other drugs as a subtle but effective means of social control. Thus, while there has been some attention to the link between drug abuse and socio-economic conditions, this is not a well-developed area, and certainly the link between crime and drug abuse

for Indigenous people in Canada's jails.

Inmate self-help groups developed to stimulate identity, self-worth, and provide emotional support are a feature of most progressive correctional systems. Indigenous people have developed brotherhoods and sisterhoods within the "walls" to effect these ends. We have no research literature which evaluates these groups. Research should initially address their goals and the support they get from both membership and administration.

An interrelated theme is that of inmate grievance processes. Disciplinary procedures in institutions have been notoriously arbitrary, cumbersome, and frequently devoid of due process. The Indigenous inmate, for both social and linguistic reasons, is particularly vulnerable when appearing before such tribunals. There is no evidence of either any programs or any research literature which explores this aspect of the Indigenous inmate's oppression and how recent changes in some jurisdictions have affected Indigenous prisoners.

The discrimination explanation of Indigenous over-representation in jails, especially the recidivism rate which partly constitutes this over-representation, has led reformers to call for the indigenization of corrections personnel and institutions dealing with Indigenous inmates or probationers. Research on the utility of these proposals based on pilot projects and introduced "South of Sixty" would be most useful. The same issues of stress and recruitment as pertain in the law enforcement field should be addressed.

deserves further research.

Judicial Practice and the Use of Fines

The view that fines are an alternative to custodial penalties is based on several assumptions including the idea that the convicted person has more money than time to spare. This assumption in turn rests upon the assumption that the individual is an active participant in the cash-economy. The appropriateness of fines for many Indigenous people seems highly questionable. This is especially the case when the consequence of non-payment is imprisonment. Research into the use of fines, their relevance to the fined and their dependents, and judicial appreciation of the regressive nature of fines for low income people is required. Little research exists on the extent to which time to pay is offered. Comparative data on the success of fine option, mediation-diversion, CSO's, and similar programs should be made available. Research comparing the non-imprisonment of non-Indigenous as opposed to Indigenous persons fined would be most instructive.

Finally, a systematic survey comparing Indigenous and non-Indigenous individuals with respect to sentencing leniency versus severity which reflects such variables as age, gender, socio-economic conditions, and court location is very much needed.

Indigenous People in Prison

"Normalization" and "rehabilitation" are objectives found in the rhetoric of correctional programs. There is, however, an absence of basic data on the relevance and accessibility of such "programs"

Patriarchy and the Use of Prisons

Statistics concerning the over-representation of Indigenous women are an eloquent testimony to the manifold structured inequality they experience because of race, class and gender. The research literature mirrors the society: research about women has just not been seen as important. Dubec and LaPrairie have made recent attempts to fill this gaping chasm in our understanding. Research into women's needs and research exposing the consistent denial of their social, economic, and ultimately legal rights is most urgent. Ontario and Alberta Court-worker programs, for example, have indicated the need for family court-workers; legal services are delivered significantly to women in urban (not rural) areas; and corrections research describes the inadequacy of community agencies and institutional programming for Indigenous women. It would be our contention that of all the competing claims to research monies and program funding the claim of Indigenous women is the best.

III. Principles to Guide Research

Because of Canada's colonial political framework little or no research has been conducted by Indigenous people or commissioned for Indigenous people. Hence, one can suggest that little of it is conceived in terms of the questions they might have or the objects of research they might choose. The ONCJ and NCSA are notable exceptions to this situation.

We would therefore recommend support for the Social Sciences and Humanities Research Council's development of a Native Studies

strategic research fund. Likewise we believe the Departments of the Solicitor General, Justice, and Indian Affairs should provide monies for research and for training Indigenous people as researchers. This research aid should not be tied by the same contractual terms exemplified in conventional research contracts; rather, it should come in the form of grants.

Certain principles should govern the relationship between a granting body and Indigenous people:

1. Funds and the development of research competence should enhance the capability of women and non-sectarian Indigenous groups and not simply flow to male-dominated political organizations;
2. Research priorities should be determined with the full participation of Indigenous people;
3. The initiation, design, and implementation of research should be directed/performed by Indigenous people for Indigenous people;
4. Research should be focussed on the users' information needs and should be conducted to maximize community participation in the process;
5. Data collection allowing for the comparison of Indigenous and non-Indigenous populations should be encouraged; and
6. The evaluation of predominantly non-Indigenous institutions and processes from the perspective of Indigenous people should be encouraged.

Conclusions

This review defies summary save to say that one of the criminal justice system's most recurrent failures is also one of the least understood and researched. We would be most distressed in the unlikely event that a "Natives and Justice" research industry develops out of our findings. At the same time, much research is required and we would urge that it

should be conducted wherever possible with the involvement of Indigenous peoples.

NOTES ON CHAPTER 5

1. Carol Pitcher LaPrairie and Alex Himelfarb (Introduction), "Native Juveniles in Court: Some Preliminary Observations," mimeographed (B.C.: Ministry of the Attorney General, n.d.).

2. Ibid., p.2.

3. Ibid., pp.2-3.

4. Ibid.. p.3.

5. Harold W. Finkler, "Legal Anthropology in the Formulation of Correctional Policy in the Northwest Territories, Canada" (Paper read at Symposia on Folk Law and Legal Pluralism, Vancouver, August 19-23, 1983), p.12.

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